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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MITCHELL PETERSON,  
Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.


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Upon Writ of Error to the United States District Court  
for the District of Montana.

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FILED

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**Names [and Addresses] of Attorneys.**

**APPEARANCES.**

W. F. O'LEARY, Esq., Great Falls, Montana, and  
E. A. CARLETON, Esq., Helena, Montana,  
For Plaintiff in Error.

JAMES W. FREEMAN, Esq.,  
United States District Attorney, residing  
at Helena, Montana,  
For Defendant in Error.

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*In the District Court of the United States, in and  
for the District of Montana.*

THE UNITED STATES OF AMERICA,  
Plaintiff.

vs.

MITCHELL PETERSON, et al,  
Defendants.

BE IT REMEMBERED, that on the 21st day of  
December, A. D. 1910, an indictment was presented  
and filed herein, which said indictment is in the  
words and figures following, to-wit:

## INDICTMENT.

United States of America,  
District of Montana.—ss.


In the District Court of the United States within  
and for the District of Montana, of the term  
of November, in the year of our Lord, one  
thousand nine hundred and ten.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the district of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERON and CHARLES PETERSON, late of the state and district of Montana, on the 21st day of October, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the state and district of Montana,

One steer, branded "25" on the left ribs, of  
the property of Calf Looking, an Indian  
person,

One cow, branded, "17" on the left ribs, of the  
property of Bad Marriage, an Indian per-  
son,

One cow, branded  on the left thigh,  
of the property of Catches Two, an Indian  
person,



One cow, branded  $\overline{OO}$  on the left hip of the property of Henry No Bear, an Indian person,

then lately before feloniously stolen, taken and carried away, did then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said state and District of Montana which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

#### SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further, find, charge and present:

That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 29th day of August, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the State and District of Montana,

One cow branded  $\overline{21}$  on the left shoulder, of the property of Dan Lone Chief, an Indian person,

One cow branded  $\mathcal{Z}$  on the right shoulder, of the property of Phillip Flat Tail, an Indian person,

One steer, branded "23" on the right hip, of the property of Ben Four Horns, an Indian person.

One cow, branded "30" on the right hip, of the property of No Runner, an Indian person,

One steer, branded  $\mathcal{P}$  on the right hip, of the property of Wild Gun, an Indian person,

One cow, branded, "O" on left thigh, of the property of Little Buffalo Stone, an Indian person,

One cow, branded "R" on the right shoulder, of the property of Young Bear Chief, also known as Bear Chief, an Indian person,

Ten head of other cattle, of the property of


various Indian persons, whose true names are to the grand jurors aforesaid unknown, then lately before feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchell Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.


### THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MEL-

VIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 29th day of July, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the State and District of Montana,

One steer, branded  on the right hip, the property of Mrs. John Whiteman, sometimes known as Dirty Face, an Indian person,

One steer, branded  on the left hip, the property of Mary Teasdale, an Indian person,

Six other head of cattle, the property of various Indian persons whose true names are to the grand jurors aforesaid unknown, then lately before feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction



of the United States; that the said Mitchel Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

#### FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:


That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 7th day of July, A. D. 1910, at within and upon the Blackfeet Indian Reservation, in the State and District of Montana,

One steer, branded  on the left hip,

the property of Bryan Connelly, an Indian person,

One cow, branded  on the left hip,

the property of Bryan Connelly, an Indian person,

One steer, branded  on the left shoul-

der, the property of Joe Cobbell, an Indian person,

One cow, branded  on the left shoul-

der, the property of Joe Cobbell, an Indian person,

Two other head of cattle belonging to various other Indian persons, whose true names are to the grand jurors aforesaid unknown, then lately before said date feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchel Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and

against the peace and dignity of the United States of America.

JAMES W. FREEMAN,

United States Attorney, District of Montana.

(Endorsed): No. 1712. United States District Court, District of Montana. United States of America, v. Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson. Indictment: A True Bill, Alfred B. Guthrie, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana. Witnesses: Frank Monroe, Old Rock, Henry Marceau, Joe Tattsey, Doublecloth, Brocky, Dick Kipp, Eagle, Young Running Crane, Wallace Night Gun, Susie Goss, Ella Clark, Malcolm Clark, Joe Brown, A .E. McFatridge, Robt. Hamilton, Bill Upman, Old Person. Presented by the grand jury in open court, by their foreman, in their presence, and filed this 21st day of Dec. A. D. 1910. Geo. W. Sproule, Clerk By C. R. Garlow, Deputy. Bonds fixed at \$1000, Carl Rasch, Judge.

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### BENCH WARRANT.

United States of America,  
District of Montana,—ss.

To the Marshall of the United States, for the District of Montana, and his Deputies, or any or either of them, Greeting:

WHEREAS, at a District Court of the United States of America for the District of Montana, begun and held at the city of Helena within and for

the District aforesaid, on the 21st day of December in the year of our Lord one thousand nine hundred and ten the Grand Jurors in and for the said District, brought into the said Court a true BILL OF INDICTMENT against Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson for buying and receiving stolen property as by the said Indictment, now remaining on file and of record in said Court, will more fully appear; to which Indictment the said Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson have not yet appeared or pleaded:

NOW, THEREFORE, You are hereby commanded, in the name of the President of the United States of America, to apprehend the said above named persons and them bring before the said Court, at the United States District Court Room, in the Federal Building, at Helena, Montana, to answer the Indictment aforesaid.

WITNESS, the Honorable CARL RASCH, Judge of the United States District Court, for the District of Montana, and the seal of said District Court, this 21 day of Dec. in the year of our Lord one thousand nine hundred and ten and of our Independence the 135.

GEO. W. SPROULE,  
Clerk.

(Seal of Court)

By C. R. GARLOW,  
Deputy Clerk.



MARSHAL'S OFFICE.

United States of America,  
District of Montana,—ss.

In obedience to the Warrant, I have the body of the said Charles Peterson and Oscar Peterson before the Honorable District Court of the United States, in and for the District of Montana, at Helena, this 31st day of December, A. D. 1910.

ARTHUR W. MERRIFIELD,

U. S. Marshal.

By CHARLES MORGAN,

Deputy.

Mitchell Peterson,

Walter Peterson

Out on bonds.

After diligent search and inquiry the therein named  
Melvin Peterson could not be found within the  
District.

(Endorsed): No. 1712. United States District Court, District of Montana. United States of America vs. Mitchell Peterson, et al. Bench Warrant. Bail Fixed at \$1000 each. Carl Rasch, Judge. Filed Jan. 31st, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

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*In the District Court of the United States in and  
for the District of Montana.*

No. 1712, United States vs. M. Peteron, et al.

The United States Attorney with the defendants and their counsel present in court; and thereupon the jury returned into court and reported to the court that they only had agreed upon a verdict as to the defendant Walter Peterson, but were unable to agree as to the defendants Mitchell Peterson and Charles Peterson. Thereupon the jury was instructed and directed by the court to again retire for further deliberation, the defendants then and there excepting to certain instructions or remarks of the court, and exception noted. And thereafter the jury, having agreed upon a verdict, again returned into court, the defendants and respective counsel being present as before and thereupon the jury returned two verdicts, which were received by the court and ordered filed and entered, and are as follows, to-wit:

“We, the jury in the above entitled cause, find the following defendant, Mitchell Peterson, guilty in manner and form as charged in count one of the indictment, and the defendant not guilty as charged in counts two, three and four of said indictment, and recommend the greatest clemency by the court.  
H. H. Stanley, Foreman.”

“We, the jury in the above entitled cause, find the defendant Walter Peterson and Charles Peter-

son not guilty in manner and form as charged in the indictment. H. H. Stanley, Foreman.”

Thereupon defendants Walter Peterson and Charles Peterson discharged and their bonds exonerated as to the above entitled cause.

Thereupon time for sentence waived by defendant Mitchell Peterson, and thereupon said defendant Mitchell Peterson sentenced to serve twelve months and one day, at hard labor, in the United States penitentiary at Leavenworth, Kansas, and to pay a fine of Two Hundred Dollars and costs, and judgment ordered entered accordingly.

Thereupon, on motion of his counsel, said defendant Mitchell Peterson was granted sixty days in addition to the statutory time within which to prepare and serve bill of exceptions and to file petition for a new trial herein, defendant meanwhile released upon the bond heretofore given.

Entered, in open court, March 9, 1913.

GEO. W. SPROULE, Clerk.

ATTEST, a true copy of record:

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy Clerk.

(Seal of Court.)

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CHARLES PETERSON, MITCHELL  
PETERSON and WALTER PETERSON, et al,  
Defendants.

No. 1712.

VERDICT.

We, the jury in the above entitled cause, find the following defendant, Mitchell Peterson guilty in manner and form as charged in count one of the indictment, and the defendant not guilty as charged in counts Two, Three and Four of said indictment, and recommend the greatest clemency by the court.

H. H. STANLEY,

Foreman.

Filed and Entered March 29, 1913.

GEO. W. SPROULE, Clerk.

---

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CHARLES PETERSON, MITCHELL  
PETERSON and WALTER PETERSON, et al,  
Defendants.

No. 1712.

VERDICT.

We, the jury in the above entitled cause, find the defendant Walter Peterson and Charles Peterson not guilty in manner and form as charged in the indictment.

H. H. STANLEY,

Foreman.

Filed and Entered Mar. 29, 1913.

GEO. W. SPROULE, Clerk.

---

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MITCHELL PETERSON,  
Defendant.

No. 1712.

JUDGMENT.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of feloniously buying and receiving certain stolen cattle, to-wit: one steer of the property of Calf Looking, an Indian person and ward of the government of the United States, one cow of the property of Bad Marriage, an Indian person and ward of the government of the United States, one cow of the property of Catches Two, an Indian per-



son and ward of the government of the United States, and one cow of the property of Henry No Bear, an Indian person and ward of the government of the United States, knowing the same to have been stolen, committed on the 21st day of October, A. D. 1910, at and upon the Blackfeet Indian Reservation, in the State and District of Montana, as charged in count one of the indictment herein; and of his indictment, arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as charged in said count one of said indictment.

And the said defendant Mitchell Peterson was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to-wit:

That whereas, the said defendant having been duly convicted in this court of the offense of feloniously buying and receiving certain stolen cattle, to-wit: one steer of the property of Calf Looking, an Indian person and ward of the government of the United States, one cow of the property of Bad Marriage, an Indian person and ward of the government of the United States, one cow of the property of Catches Two, an Indian person and ward of the government of the United States, and one cow of the property of Henry No Bear, an Indian person and ward of the government of the

United States, knowing the same to have been stolen, committed on the 21st day of October, 1910, at and upon the Blackfeet Indian Reservation, in the State and District of Montana, as charged in said count one of the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Mitchell Peterson, be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, at hard labor, for the term of twelve months and one day, and that you pay a fine of Two Hundred Dollars and costs taxed in the sum of \$1189.35 and be confined in said penitentiary until said fine and costs are paid or you are legally discharged according to law.

Judgment rendered and entered this 29th day of March, 1913.

GEO. W. SPROULE,  
Clerk.

ATTEST: a true copy of Judgment:

GEO. W. SPROULE,  
Clerk.

By C. R. GARLOW,  
Deputy Clerk.

(Seal of Court.)

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CLERK'S CERTIFICATE TO JUDGMENT  
ROLL.

United State of America,  
District of Montana,—ss.

I, GEORGE W. SPROULE, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Witness my hand and the seal of said court at Great Falls, Montana, this 29th day of March, A. D. 1913.

GEO. W. SPROULE,  
Clerk.

By C. R. GARLOW,  
Deputy Clerk.

(Seal.)

(Endorsed): Title of Court and Cause. Judgment Roll. Filed Mar. 29, 1913. Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy Clerk.

---

And thereafter, and on the 29th day of March, 1913, the court duly granted defendant sixty days in addition to the statutory time within which to prepare and serve bill of exceptions and to file petition for a new trial herein.

Be it further remembered, that upon the trial of the aforesaid cause, and on the 24th day of March, 1913, the defendant served and filed a motion herein, as follows:

(Title of Court and Cause.)

MOTION.

Come now the defendants above, by E. A. Carleton, Esq., their attorney, and move the court to dismiss the above entitled cause, and that the defendants, and all of them, may go hence without day, upon the grounds and for the reasons following, to-wit:

That this court cannot now constitutionally or legally try said defendants, or any of them, under the indictment herein; for that said defendants have not had a speedy trial of said cause, in this to-wit:

(a). That on the 14th day of October, 1911, the defendants herein were duly granted a new trial by this court, all of said defendants having been a short time before said date convicted in this court under the indictment herein, and that since said time three terms of this court have been duly and regularly held at which a jury has been in attendance, at any one of which said terms said cause could have been tried if it was ever intended or desired to try the said defendants again; that no efforts or any steps whatever have been taken to bring said defendants, or any of them, to trial under said indictment since the granting of their motion for a new trial, notwithstanding that three terms of this court have been held, and notwithstanding that said defendants have been ready, anxious and willing at all times to have said cause tried and disposed of if it was ever to be tried at all.

(b). That to now try said defendants, or either of them, upon the indictment herein, and after the lapse of such a long period of time since the filing of the indictment herein, and after the expiration of so long a period of time since the alleged offences charged in the indictment, were committed, and likewise after the expiration of so long a period of time since the granting of the motion for a new trial, would be a violation of the constitutional rights of these defendants and would be in disregard of due process of law.

The foregoing motion will be made upon affidavits and testimony to be introduced at the hearing and upon all the records and files in the case.

E. A. CARLETON,

Attorney for Defendants.

Due service of the foregoing motion is hereby admitted this 24th day of March, 1913.

J. W. FREEMAN,

United States Attorney.

(Endorsed): Title of Court and Cause. Motion. Filed Mar. 24-1913. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.

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That on March 25th, 1913, the defendant served and filed the following affidavits in support of said motion:



(Title of Court and Cause.)

AFFIDAVIT.

State of Montana,

County of Lewis and Clark.—ss.

E. A. CARLETON, first being duly sworn, on oath deposes and says: that he is the attorney of record for the defendants above named and as such attorney tried the aforeaid cause and secured a new trial of the defendants who were convicted under said indictment and which said new trial was secured on or about the 14th day of October, 1911; that since the granting of said motion for a new trial affiant has been anxious as have his clients to have said cause disposed of and he has been ready, willing and anxious at all times to have the same heard and determined at the earliest possible date, for the reason that the longer the trial is delayed the more dim become the facts and circumstances in the minds of the witnesses relating to the commission of the offences charged in the indictment; that considering the nature and character of the offences as adduced at the first trial of said cause, and particularly the verdict returned by the jury, affiant, as well as his client has seriously doubted whether or not the government would ever again try said cause or put the defendants again upon trial under said indictment, but have been expecting that the aforesaid indictment would be dismissed and this impression has grown stronger the longer the government has delayed to have said cause tried again; that since the granting of said

motion for a new trial three terms of this court with a jury have been held at any one of which said terms said cause could have been tried and disposed of if it was ever intended or desired to try said cause again; that affiant has made no application for any delay or postponement of said cause at any time since the granting the defendants their said motion for a new trial, and netiher he nor his clients have consented to the same, but that said postponements and delays have been occasioned solely by reason of the prosecution, and when there was ample time and opportunity to have tried said case long ago; that since said motion for a new trial was granted quite a large number of criminal cases have been tried, to the personal knowledge of affiant, and where the defendants were out on bail and in which cases indictments had been returned long subsequent to the said 14th day of October, 1911, when the said motion for a new trial herein was granted, and that the government had had due and ample opportunity to have tried said cause long since and to have had the same disposed of if it ever did wish to try it again.

And affiant further makes oath and says that by reason of the long period of time elapsing since said motion for a new trial of the aforesaid defendants was granted, that he has for sometime come to believe that said cause would never be tried again and that it would be ultimately dismissed.

And affiant further makes oath and says that the indictment charges a number of offences alleged to

have been committed sometime during the year 1910, and that so long a period of time has elapsed since said time and likewise so long a period of time has elapsed since the granting of said motion for a new trial, that it is now impossible for these defendants to have a fair and impartial trial under said indictment by reason of the lapse of said long period of time and that to now put these defendants upon trial under said indictment, under all the circumstances above named, would be to deny to them the right of a speedy trial.

E. A. CARLETON,

Subscribed and sworn to before me this 20th day of March, 1913.

E. D. WEED

Notary Public for the State  
of Montana, Residing at  
Helena, Montana. My Com-  
mission expires Jan. 5th,  
1915.

(Natorial Seal.)

(Endorsed): Title of Court and Cause. Affidavit of E. A. Carleton. Service acknowledged S. C. Ford, Asst. U. S. Atty. Filed March 25-1913. Geo. W. Sproule, Clerk.

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(Title of Court and Cause.)

AFFIDAVIT.

State of Montana:

County of Cascade.—ss.

MITCHELL PETERSON, CHARLES PETERSON, and WALTER PETERSON, each being duly, severally sworn, each for himself and not one for the other, upon oath deposes and says: that he is one of the defendants above named; that the indictment herein was returned by the grand jury and filed on or about the 21st day of December, 1910, and that the trial of the aforesaid cause upon defendants' plea of not guilty, was begun on the 19th day of June, 1911, resulting in a verdict of guilty for Mitchell, Charles and Walter Peterson as charged in counts one, two, three and four of said indictment, and a verdict of not guilty for their codefendants, Oscar and Melvin Peterson; that thereupon sentence of defendants was suspended pending their motion for a new trial which was duly made and heard, and the same was duly granted by this Court on the 14th day of October, 1911.

And affiants further make oath and say that notwithstanding that their motion for a new trial herein was granted by the court on the said 14th day of October, 1911, that not one of them has ever been tried under said indictment since said time nor has the case of one of them ever been brought on for trial since their said motion for a new trial was granted, although affiants have always been ready,

willing and anxious to have said cause tried and disposed of at the earliest possible date, if they were ever to be tried again.

And affiants further make oath and say that they are reliably informed and verily believe their information to be true and therefore allege the fact to be, that there have been three terms of this court at which a jury has been in attendance since their said motion for a new trial was granted and that at any one of which said terms the aforesaid cause might have been brought on for trial and tried and disposed of if it was ever desired or intended to retry this case; that none of the affiants has ever consented to any postponement or delay of the trial of the aforesaid cause, nor have they made application for any postponement or any delay of the same, but that the same has been done solely by the prosecution without the consent of the affiant, and to suit solely the pleasure of the prosecution without the consent of affiants and to suit solely the pleasure of the prosecution; nor were said postponements or delays occasioned by any reason, as affiants are informed and verily believe, save and except a desire and wish of the prosecution not to try said cause sooner.

And affiants further make oath and say that since the granting of their said motion for a new trial as aforesaid, at different terms of this court which have been held since, many cases have been tried with a jury in which indictments have been returned by the grand jury long subsequent to the



return of the aforesaid indictment, and that many cases, where the defendants were out on bail and not imprisoned, were likewise tried and disposed of.

And affiants further make oath and say that to now put them on their trial under said indictment and after the expiration of nearly three years since the time the offences charged in the indictment herein are alleged to have been committed, and likewise after the expiration of more than sixteen months from the time their motion for a new trial herein was granted, would work the greatest hardship and injustice, in that, the witnesses have become more or less scattered and are now beyond the jurisdiction of the court and especially for the reason that the facts and circumstances relating to the several offences alleged in the indictment herein, have passed away and faded from the memory of the witnesses, to a very great extent making it impossible for the witness to now remember in detail the facts and circumstances connected with the alleged offences charged in the indictment herein.

MITCHELL PETERSON,  
CHARLES PETERSON,  
WALTER PETERSON

Subscribed and sworn to before me this 25th day of March, 1913.

E. A. CARLETON,  
Notary Public for the State of Montana. Residing at Helena, Montana.  
My Commission expires July 30, 1915.

(Notarial Seal.)

(Endorsed): Title of Court and Cause. Affidavit of Mitchell Peterson, Charles Peterson and Walter Peterson. Service acknowledged S. C. Ford Asst. U. S. Atty. Filed March 25, 1913. Geo. W. Sproule, Clerk.

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That on the 22nd day of July, 1913, the defendant filed his Bill of Exceptions No. 1, being in the words and figures following, to-wit:

(Title of Court and Cause.)

DEFENDANT, MITCHELL PETERSON'S ENGROSSED BILL OF EXCEPTIONS.

No. 1.

BE IT REMEMBERED, that the above entitled cause came on for trial in the above entitled court, on the 26th day of March, A. D. 1913, before the Hon. Geo. M. Bourquin, District Judge presiding.

WHEREUPON, the Court asked if the parties were ready for trial. Thereupon the counsel for defendants announced to the court that the defendants were not ready for trial for the reasons stated in their written motion, heretofore duly filed in this court, and which said motion are supported by affidavits, moving the court to dismiss said case for the reasons stated in said motions and affidavits, and further announcing to the court that said motion had been set for hearing at this time.

BY THE COURT: These motions coming at this time are very much to be discouraged at the last hour, with the cases on trial and a jury in attend-

ance. When a case is set, or before it is set, all these motions should be disposed of, otherwise the jury is compelled to cool its heels around the corridor. This motion-under the rules is entitled to five days' notice, and if the Court otherwise ought to grant it, an objection made on that score the Court is inclined to sustain it.

BY MR. CARLETON: The papers show due service and supported by affidavits. I will say at this time we desire simply to make a record, and we should of course like to have been heard on the motion. We think there is a very serious proposition involved, namely the constitutional right of this defendant to be tried at this time.

BY MR. FREEMAN: All I have to say, there was some motion came in and we signed it; this morning they come in with some affidavits which, while we have accepted service this morning, at the same time I have only had time to glance over them; I don't know what they contain or anything of the kind. I suppose it will necessitate the matter going over so that we could have sufficient time to file counter-affidavit so they will set up what the true facts are with reference to the record in the case.

BY THE COURT: The affidavits also come too late; they should have been served with the notice of motion; and the Court will decline to entertain the motion, and exception can be noted.

BY MR. CARLETON: I would like to have an exception on this and at this time, so the record

can be clear, there are three of these several motions; I suppose the record may show they were all brought up, the same action taken by the Court, and the defendants in each and every case reserve their exception to the ruling.

BY THE COURT: Let the order be made that, the motions and affidavits not having been filed and served within the time required by the Court, the Court declines to entertain the motion.

BY MR. CARLETON: We desire also, in order that the record may be complete, to offer these affidavits in evidence, and also desire to offer some oral testimony in each case to corroborate and support the averments in the affidavits.

BY THE COURT: The Court having declined to hear the motion and said motions it being provided by the rules shall be heard upon affidavits, will refuse to entertain any such offer.

BY MR. CARLETON: And the record in each will show the exceptions of the defendants.

WHEREUPON, the Court directed a jury to be impaneled to try said cause which was accordingly done. Thereupon the District Attorney made opening statement to the jury. Whereupon Joe Brown, a witness for the Government was called and sworn as a witness.

Thereupon counsel for the defendants objected to the introduction of any testimony under said indictment and which said objection is as follows:

The defendants on trial in this indictment jointly and severally now object to the introduction of

any testimony under this indictment for the reasons stated in their written motion to which we now make reference and that those reason and matters stated in the written motion may be considered as now made a part of our objection.

**BY THE COURT:** The objection is overruled.

To the ruling of the Court in overruling said objection counsel for the defendants then and there duly excepted.

That the motion above referred to, to dismiss said cause, filed of record in this case, is in words and figures as follows to-wit:

(Here insert Motion to Dismiss.)

That the affidavits filed in support of said motion, and above referred to, are as follows:

(Here insert affidavits of Mitchell Peterson, Charles Peterson and Walter Peterson, and affidavit of E. A. Carleton.)

Come now counsel for the defendants herein and submit this as their bill of exceptions herein, to the action of the Court in refusing to entertain their said motion to dismiss this prosecution and to the refusal of the court to dismiss the same, and move that the same may be settled, allowed, signed and certified by the Judge as true and correct as provided by law.

W. F. O'LEARY, and  
E. A. CARLETON,

Attorneys for Defendants.

Due service of the foregoing bill of exceptions is hereby admitted this 31st day of March, 1913.



JAS. W. FREEMAN,

United States Attorney.

United State of Montana,

District of Montana.—ss.

And now, on this 22nd day of July, 1913, and within the time allowed by law and the orders of this Court, the foregoing engrossed bill of exceptions to the action of the Court in declining to entertain defendants' motion to dismiss the prosecution herein or to hear evidence in support thereof, and to dismiss said prosecution, is hereby settled, allowed and signed and certified as true and correct, and contains substantially all the records and proceedings, matters and things relative to said matter.

Wherefore the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,

Judge.

(Endorsed): Title of Court and Cause. Defendant Mitchell Peterson's Engrossed Bill of Exceptions No. 1. Filed July 22, 1913. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.

That on May 2nd, 1913, and within the time allowed by law and the orders of the court, the defendant served and tendered the following bill of exceptions herein on his petition for a new trial, and that on the 22nd day of July, 1913, the same was filed and entered, and which said bill of exceptions is in the words and figures as follows, to-wit:

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MITCHELL PETERSON,  
CHARLES PETERSON and  
WALTER PETERSON,  
Defendants.

DEFENDANT, MITCHELL PETERSON'S  
BILL OF EXCEPTION ON PETITION  
FOR NEW TRIAL

BE IT REMEMBERED, that the above entitled cause came on regularly for trial before the above entitled court, sitting with a jury, on the 26th day of March, 1913, the Hon. George M. Bourquin, United States District Judge, presiding.

The Hon. James W. Freeman, United States Attorney for the District of Montana, and S. C. Ford, his assistant, appearing on behalf of the United States and W. F. O'Leary and E. A. Carleton appearing on behalf of the defendants.

Whereupon the following testimony was introduced and the following proceedings were had and done in the trial of said cause.

The Hon. James W. Freeman, United States District Attorney thereupon made opening statement to the jury. Whereupon E. A. Carleton, Esq., of counsel for the defendants, likewise made open-

ing statement to the jury, in which statement counsel stated to the court and jury that the defendants would admit and did admit that the property described in the indictment herein, with the exception of the last three head in count four thereof, had been stolen as charged in the indictment and that the owners and brand of said cattle were as described therein and that this admission was made for the purpose of saving expense and shortening the trial.

Thereupon the court stated to counsel, that in view of the admissions of counsel for the defendants in his opening statement to the jury the trial of said cause should be materially lessened.

Thereupon Mr. Carleton, of counsel for the defendants, made in open court the following admissions:

Without waiving any right that we have under our objection just made to the introduction of any testimony in this case, the defendants now make the following admissions:

(Thereupon the court excused the jury for a period of ten minutes.)

MR. CARLETON: In count two let the record of this court show that the animal described as the Philip Flat Tail cow, that portion of the count, that it has been dismissed.

MR. FREEMAN: Well of course as far as that is concerned I want it understood that as to that at the last trial of the case Phillip Flat Tail was not present and that part of it was stricken out by

the order of the court necessarily but as far as evidence is concerned we shall offer that at the proper time.

BY THE COURT: The material thing now is that that count has been dismissed. I mean that part of the count with reference to Phillip Flat Tail.

BY MR. CARLETON: The defendants jointly and severally, without waiving any rights under their objection to the introduction of any evidence in this cause, now make the following admissions for the record: They each and all admit that all of the animals described in count one of cause number 1712 were received and branded by them and at the time they were stolen property. As to count two they make the same admission, the Phillip Flat Tail cow being eliminated.

BY THE COURT: The jury will understand that while the defendants are admitting that some of the cattle were stolen and received and branded they are not admitting that they knew it was stolen.

BY MR. CARLETON: It will be understood that this admission is without any prejudice. They are also prepared to admit—Likewise the same admission as to count three of the indictment. As to count four, the defendants and each of them now make the following admission: That as to the Bryan Connelly steer branded PY on the left hip, they admit this animal was received and branded by them, and that at the time it was stolen. But as to the three remaining animals they cannot make

any such admission, or make any admission of any kind.

BY MR. FREEMAN: I do not know whether this is going to amount to very much or not.

BY THE COURT: Well you are not obliged to prove ownership or that the cattle were stolen or received by these defendants, or branded but any other circumstances you must prove that is involved in that.

Whereupon the following witnesses were called and the following testimony was offered on the part of the prosecution, and being in substance all the testimony and evidence that was offered and introduced upon the trial of said cause, the defendants not offering any testimony.

JOE BROWN, a witness called and sworn on behalf of the plaintiff testified in sustance as follows:

DIRECT EXAMINATION BY MR. FREEMAN.

MR. FREEMAN: If the court please I may cover certain portions of the admissions. I can't cut the case down.

BY MR. CARLETON: We have no objection to that at all. I would request that you let us know which of the counts you are taking up first so we may know to what counts the evidence is adduced.

BY MR. FREEMAN: I don't know about that.

Q. State your name.

A. Joe Brown.

I have lived at Browning on the Blackfeet Indian Reervation fourteen years, and was living



there in the year 1910. At that time I was superintendant there of livestock on the reservation, and I held that position under Mr. McFatridge and was holding that position along the last of October and the first of October in 1910.

Q. State whether or not upon that occasion—whether or not along about that time you received any instructions as superintendent of livestock to round up the cattle or certain cattle in the fields and in the possession of the defendants, here?

BY MR. CARLETON: Objected to as irrelevant, incompetent and immaterial and outside of the issue in the case.

BY THE COURT: Oh, that's material, simply preliminary. Simply leading up to something else. Overruled.

BY MR. CARLETON: Note our exception.

A. Yes sir I did.

My instructions referred to the Peterson cattle.

Q. To what ones of the Peterson cattle?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial and hearsay.

BY THE COURT: Overruled.

BY MR. CARLETON: Note our exception.

A. I was instructed to gather all cattle that bore the Peterson brands and other brands aside from the Peterson brand.

Q. Those that bore the straight Peterson brand, did you pay any attention to them?

A. Yes sir.

Pursuant to that they deputized some man to

help me go and gather these cattle,—to pick up these cattle that were branded with other than Mr. Peterson's brands. I went out near the Canadian line where they had a ranch and from there we went to another ranch on the north fork of Milk River and from there to the home ranch on the south fork of Milk River and got cattle from two of the ranches. Malcolm Clark, William Haggerty, Joe McKnight, Matt Lytle, Joe Doyle, Dave Clair, Levi Bird,—I might have had another man, that is all at this time I remember I had with me at that time. We went out to the north ranch, went to Mr. Galbraith's place and stayed over night so that we could get an early start the next morning. We started early in the morning cutting out the cattle according to instructions.

BY MR. CARLETON: We object to any testimony unless confined to the cattle described in this indictment.

BY THE COURT: Overruled.

BY MR. CARLETON: Exception.

We cut out the cattle we wanted and brought them to Browning on the next day. After we got to Browning we made a particular examination of the brands of these various cattle. We took and put these cattle in a chute and clipped the hair on the animals so we could see the brands and took a record of the brands. I have a list of the brands here of the cattle that I took there at the time of the inspection. Among that bunch of cattle I found a steer branded 25 on the left ribs, the property of

one Calf Looking. I also found upon that occasion a cow branded TS on the left thigh, the property of Catches Two; also a cow branded OO on the left hip; I didn't find a cow branded 21 on the left shoulder, the property of Dane Lone Chief, there wasn't any like that.

Q. Tell us whether or not upon that occasion you found a cow branded CZ on the right shoulder?

A. A steer I have it here.

The CZ is the brand of Phillip Flat Tail's father, who is dead.

BY MR. CARLETON: I understand the Phillip Flat Tail animal is eliminated.

COURT: It may develop as a circumstance. Proceed.

Among that list I did not find a steer branded 23 on the right hip nor a cow branded 30, but there is a cow here branded R on the left thigh.

Q. A cow branded R on the right shoulder?

A. I have a steer here.

Q. You have a steer, but no cow?

A. No cow.

I have in this list a steer branded lazy FY on the right hip, also a steer branded YP on the left hip. The steer branded YP on the left hip had also a Y bar K brand on the left ribs, which brand belongs to Maggie Peterson.

Q. Tell us what brand the steer—if there was any other brand on the steer besides the lazy FY on the right hip?

A. Y bar K on the left ribs.

Q. And the cow branded O on the left thigh?

A. She had a Y bar K on the left ribs.

Q. And the cow branded,—and the steer branded CZ of Flat Tail?

BY MR. CARLETON: We object to that as incompetent, irrelevant and immaterial and serves no issue in this case and is an attempt to try an issue already disposed of.

BY THE COURT: Proceed. Overruled.

BY MR. CARLETON: Save an exception.

A. This steer was branded Y bar K on the left ribs.

Q. A steer branded 25 on the left ribs the property of Calf Looking, what other brand on that?

A. Lazy U lazy J on the right ribs.

That is the brand of Mitchell Peterson. The cow branded 17 on the left ribs, the property of Bad Marriage, also had on it the same lazy U lazy J on the right ribs. The cow branded TS on the left thigh, the property of Catches Two, had on it also the lazy U lazy J on the right ribs. Likewise the OO cow of Henry No Bear, had the same brand on it. We found a cow among this bunch branded JT on the left shoulder, which had a Y—K on the left ribs.

Q. State whether or not you found among the bunch of cattle a steer branded lazy P diamond on the left shoulder.

BY MR. CARLETON: The defendants object to any evidence regarding the branding of any other animals except those described in the indictment.

ment as incompetent, irrelevant and immaterial and an attempt to prove an independent offense.

BY THE COURT: I assume the prosecution sees a circumstance in it. The objection is overruled.

BY MR. CARLETON: Exception. And we object to all evidence regarding any other animals or their branding save and except those described in the indictment in the case now on trial.

Which exception was by the Court overruled to which ruling of the court counsel for the defendants then and there duly excepted.

A. This steer with the lazy P diamond on the right shoulder was branded RK on the left shoulder.

Q. And the JT,—I believe you stated that had a Y—K on it.

A. Yes, sir.

We found among that bunch a steer branded T anchor P, which had a D lazy P on the left ribs. The D lazy P brand is on my books as recorded to Mitchell Peterson.

Q. I will ask you whether or not in that bunch you found a cow branded HM on the left hip?

BY MR. CARLETON: Objected to for the reason stated in the last objection.

BY MR. FREEMAN: I expect to show as a matter of fact these cattle were stolen cattle and were in that field at that time.

MR. CARLETON: We object for the further reason that the count has already been dismissed



as the records of this court show and as we offer to prove.

BY THE COURT: There are circumstances under which that evidence is admissible.

BY MR. FREEMAN: We have already shown that they were in the field of the defendants upon this occasion. We are not going out and simply picking up animals that are out upon the open range, but in the fields of these defendants at this particular time.

BY THE COURT: You are claiming that these were all in the bunch together?

Objection. Overruled. Exception for defendants.

WITNESS: Yes sir.

Q. State whether or not you found a brand,—P lazy S on the left shoulder, a cow?

BY MR. CARLETON: We object to that for the reasons last stated.

BY THE COURT: Overruled.

BY MR. CARLETON: Exception:

A. Yes sir.

There was a Y—K brand upon that animal. The P lazy S brand belongs to an Indian by the name of Brockey. In that bunch we also found a steer branded ER on the left shoulder with the Y—K brand upon it. The ER brand belongs to an Indian by the name of Eagle.

Q. State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left shoulder?

BY MR. CARLETON: We object to that.

COURT: Overruled.

BY MR. CARLETON: Note our exception.

The E2 brand belongs to an Indian by the name of Young Running Crane. There was a Y—K brand upon it at that time.

Q. State whether or not you found among that bunch at the time a cow branded DC on the left hip?

BY MR. CARLETON: We object to that.

COURT: Overruled.

BY MR. CARLETON: Exception.

A. No sir.

Q. Do I understand you to say there wasn't a cow branded DC on the left hip?

A. I understood you to say BC.

Q. No, DC?

A. Yes, sir.

BY MR. CARLETON: If the court please I should like to have the record show that the defendants each and all object to all testimony regarding these and all other animals not described in the indictment herein and that they save an exception to the ruling of the court in each instance admitting such testimony.

BY THE COURT: The record may so show.

There was a cow branded DC on the left hip which belongs to an Indian by the name of Double Cloth. It had on it a Y—K brand also. When we went out there and gathered up this stuff at the Peterson ranches, Walter Peterson, Melvin Pet-

erson,—I don't just remember who all were there. They had the cattle rounded up in the field and were cutting out some cattle when we rode up. I think I spoke to Walter Peterson first when I rode up.

Q. Did you see Charles Peterson upon that occasion?

A. No sir. I don't think he was there.

There was also this man that they deputized to go with me there at the time. I don't remember whether Mitchell Peterson was there or not but there were some more. There were more helping them cut out the cattle.

Q. At the time that you took these cattle down to the Agency did you notify anybody as to what you were going to do at the Agency with reference to these brands?

MR. CARLETON: Objected to as incompetent, irrelevant and immaterial.

COURT: Overruled.

MR. CARLETON: Note our exception|.

Q. Who did you notify and what did you say to them?

MR. CARLETON: We object to that as incompetent, irrelevant and immaterial.

COURT: Overruled.

MR. CARLETON: Exception.

A. I told Mr. Charles Peterson and I don't remember which one of the boys. I told one of the boys that we were going to put them in a chute and clip them and take a record of the brands.

I think all of the defendants were present at Browning the next day, I am not positive. Oscar helped me. I think Walter was there. I am not positive as to Mitchell, Melvin was there.

Cross Examination.

(By MR. CARLETON.)

Q. Mr. Brown are you positive as to the ownership of that Y—K brand?

A. No sir, only what our records at the Agency show.

I have examined the records that I can testify that that brand belongs to Maggie Peterson. The old gentleman was not at his ranch when we came. We were at Peterson's ranch then. This was at the Agency. I am not mistaken about his being at the Agency. ID stock is cattle belonging to the Indians. That is the uniform brand of Indian Department stock. I saw some Y—K ID stock in that stuff we rounded up. I would not be positive that I ever saw any Y—K without the ID. I don't know whether there is any difference whatever in the ownership of those two brands. I don't know whether they are different ones or the same one. I don't know that Y—K ID is Mrs. Peterson's brand, and the Y—K is Mr. Peterson's brand. I don't know whether Maggie Peterson has her brand recorded or not. I am speaking of the registration at the Agency. In the case of a white man living on the reservation his brand is recorded at the Agency.

Q. When was this that you got orders to round

up this stock?

A. On October 31st, 1910, we seized the cattle. I seized them soon after I got orders from Mc-Fatridge. These orders were to go to his ranches and take all stock bearing any of the Peterson's brands with a fresh brand of another brand. That is, an animal having one of the Peterson's brands and having another brand to take it. Any with the straight Peterson brand not to take it, but if it had another brand besides the Peterson brand we were to gather and bring it in whether little or large.

Q. Were those instructions in writing?

A. Some of them had written instructions.

I was the boss of the bunch. I don't think my instructions were in writing.

Q. When you came to the Peterson ranches whatever cattle you found bearing any other brand and in addition one of the Peterson brands you brought in?

A. Not all of it. I found some that I consider they had bought and got permits for and it called my attention to times they had bought cattle that I knew of.

I don't remember how many head there were of that class. There might be say twenty head.

Q. So you weren't following your instructions but your own judgment in part?

A. Well partly. The Major told me to use my judgment.

I don't know what stock we gathered. There



were brought in sixty-seven head.

Q. You knew the Petersons were buying and selling cattle? It was nothing strange to find some cattle there with other brands upon them and as to the twenty head you stated yourself they belonged to the Petersons and left them out?

A. Yes, sir.

Q. Did you consider yourself the judge to pass on each and every head?

A. No.

Q. You wanted to bring in a goodly bunch and brought them in,—you brought in a whole lot you ought not have brought in, didn't you?

A. No sir.

Q. You told us at the other trial you turned out ten head in the field being satisfied they should not have been brought in?

A. We brought them in but we turned them back.

That brings the number down to fifty-seven head. The fifty-seven head were held, held there and disposed of.

Q. Didn't you say at the other trial that you turned back some of them to the Petersons?

A. That was included in this ten.

Q. No, independent of the ten, wasn't the ten turned out on the range and didn't you so testify?

A. I don't think I did.

My recollection would be better then than now. I said at the other trial that some of the Indians

came down there and told me or said in my presence that they had sold these cattle to the Petersons and got the money and the thing was all straight. I remember that. I haven't got a memorandum of how many there were of that class that I had gathered in.

Q. You told us before didn't you how many of that class there were. The Indians came down there and stated they had sold them and got money and the thing was allright, didn't you tell us before?

A. I might have.

Q. Isn't it a fact that there were a large number of head of cattle belonging to the Petersons that were sold to an Eastern buyer and the money paid back to the extent of two hundred and fifty dollars or more?

A. What do you call a large bunch?

Q. Well enough to bring two hundred and fifty dollars.

A. Yes, sir. I don't know what they brought but a number were sold.

And the money was turned over to the Petersons. I don't know what amount. I might have said at the other trial that it was two hundred and fifty dollars.

Such of these cattle as were not turned back to the Petersons were sold. As to this 25 steer of Calf Looking I only know what I heard.

All I pretend to tell you is that these are the brands that I took down in the rounding up of

the cattle. With reference to taking these brands in that book those were taken by chuting the cattle; we clipped the hair off the brands. I was right there with the book and as the brand disclosed itself I put it down, fifty-seven head in that book. There were sixty-seven head and ten were turned out and fifty-seven were kept. These were the only means I had of getting these brands. I know Melvin Peterson, a brother of the boys. I think he was there when we were clipping the brands. Oscar was helping me. I would not swear that either Mitchell or Walter was there. I don't know whether Charles Peterson was there at that time or not. Melvin didn't show me the brands that he had. I don't think I so testified before. Melvin showed me a list of brands but not there; not the list I have.

Witness Excused.

ARTHUR E. McFATRIDGE, sworn as a witness on behalf of plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Arthur E. McFatrige, and I live at Browning on the Blackfeet Indian Reservation. I have held the position of superintendent and special disbursing agent there since May 1st, 1910. I know Calf Looking, an Indian person. He is a ward of the government.

MR. CARLETON: We admit all that. We admit that all the Indians described in the indict-

ment are wards of the government and under the charge of Major McFatridge.

I saw Government's exhibit A executed before me by the defendants whose names appear there on the paper. It was executed in my office, at the time indicated, on November 10, 1910.

MR. FREEMAN: We offer this in evidence.

(Whereupon said Government's exhibit A was received in evidence, and is in the words and figures as follows, to-wit:

Cross Examination.

(By MR. CARLETON.)

The names of the three persons who signed the affidavit are Oscar C. Peterson, Walter Peterson and Mitchell Peterson. Oscar C. Peterson is the son of Charles Peterson and was a former defendant at the first trial. This affidavit was made known to Oscar. This affidavit was made in his presence but I am not going to say whether he read it personally before it was read aloud. I could not say at the present time which one read it aloud. Possibly I read it to them. They gave me the information in it. I am not prepared to testify positively who if anyone read the affidavit.

Q. I will ask you if you know he read the affidavit?

A. No, but I know they knew the contents.

All three of them were there at the same time. I am unable to state the time of day, I think it was in the afternoon. Deputy Sheriff Rickards of

Teton County was there but I am unable to say whether he heard it read or not. These are all those who were present that I now remember. Oscar is the first one who signed the affidavit. I don't know whether Oscar Peterson bought any cattle from Bostwick or not. I don't know, outside of his signing this paper, whether he told me he did or not. There were no cattle in this bunch bearing the brand of Oscar Peterson. I don't know that Oscar Peterson ever bought a single head of cattle in his life.

Q. If that should be true and shown to be true could you then explain how he would come to sign an affidavit in which he says he bought cattle from Johnny Bostwick?

A. I didn't understand at that time that Oscar Peterson made the affidavit that he purchased them personally. I understood at that time that the Peterson family were all working together in the cattle business and these three boys were in the office and were talking with me and said they had purchased some from him and had a list they had purchased.

I don't remember which one said that. One of the boys had a book containing a list of brands and this affidavit was prepared from information which they gave.

Q. But Joe Brown already had a list?

A. No, sir, there was a number of cattle in that affidavit that was not taken.

Joe Brown had made a record of the cattle long



prior to the signing of this affidavit. In my office I had a record of every animal that came in the corral except the ten turned out. There are some in that affidavit that were not in that corral, that they had on that book, that were in that list, and the only way I know they had those cattle was from information given me. I didn't tell the three boys, Oscar, Mitchell and Walter, that I wanted to get some evidence upon which to arrest Johnny Bostwick. I didn't give them to understand I was after Johnny Bostwick for stealing stock. Johnny Bostwick had left Browning and they told me they had purchased these cattle from him and I told them if they would go and find Bostwick and ascertain whether or not they had purchased them from him that then I would file a complaint against him and after they had told me where he was I wired to the sheriff of Choteau County and to some other person where they said they thought he had gone to arrest him on the information. So the matter of the arrest and prosecution of Bostwick was talked over.

Q. That talking about the arrest and prosecution of Bostwick was before the affidavit was signed wasn't it?

A. I am unable to state. I think it was before?

Q. Some little time before as a matter of fact?

A. I think that the affidavit was made some days after the boys had told me.

When I had the conversation I didn't have the affidavit made out and show it to them and ask

if those were not some of the stock they had bought of Bostwick. When they were called into the office the affidavit wasn't all prepared, it was prepared in the presence of Mitchell, Oscar, and Walter. I ran the typewriter. The heading of this affidavit was either read by them or read to them aloud by me.

Q. You told us on the former trial you guessed they read it?

A. I think they did, yes.

Q. Did you testify on the former trial that you guessed they read it?

A. I don't remember.

MR. FREEMAN: Object to the question.

COURT: Sustained.

Defendants except.

Q. Did I ask you this question referring to this affidavit? "You stated they read it? A. I suppose they did, they had it in their hands."

A. Might have been, I think that's correct.

Q. You think that this testimony I read is correct.

A. I do.

Q. Your memory would be better at the former trial than now?

A. Well, yes.

This case was first tried on June 11, 1911. I haven't said I was positive. I also stated I am positive that they either read it or I read it to them. I am positive that they knew the contents before they signed it.

Q. Were you also asked this question: "Do you now wish to qualify your answer." A. "I will say that they read it."

A. If I said that then it must be. I don't recall my testimony at the previous trial but if I said that then it is true.

Q. If the fact is that they read the affidavit and you read it, will you explain to this court and jury the occasion for both of you reading that affidavit?

A. They had a right to read it if they wished. It is a short document easily understood. I have no explanation to make why it should be read by both myself and them.

I don't remember the exact words I used at the last trial. My memory is such that I can recall, independent of this record, what took place in the office. I could not tell positively whether Oscar read the affidavit or not or whether Mitchell read it or whether Walter read it. I know they read it some of them and I know I read it and I am positive they understood the contents and gave me the information and signed it and swore to it. I will say I know they did.

Q. What was the occasion of having them make this affidavit?

A. I don't remember at this time just how it happened any more than they had stated to me that they had purchased a great many of these cattle from Johnny Bostwick and that they had a list of the cattle purchased from him.

Q. You don't feel very friendly towards the Peterson family do you?

When I ordered this committee to round up this stock I didn't know the Petersons then, they had been in the office, but I don't know everybody who comes into the office. I knew of them and about them. I knew that Peterson was quite a stock man.

Q. Buying and selling stock on quite a large scale?

A. Oh, I didn't pay any particular attention to that.

I knew at the time that he had bought cattle of Indians. The record showed that cattle had been bought from the Indians. Yes, it is the custom among Indians, in common with that of stockmen when buying from the Indians to vent the brand and put their own brand on. The reason why I ordered this stock with the Peterson's brand on and some fresh brand brought in without knowing they had bought the stock, was that I had information from a number of Indians that the Petersons had been stealing their cattle.

Q. Who are the Indians?

A. I don't know the names.

Q. Give the name of one?

A. Malcolm Clark.

Q. Anybody else?

A. I don't think of any other names.

My idea was to bring all this stock to the Agency and then examine it as to the brands and ascer-

tain if they were purchased according to the rules and regulations of the reservation. I had never proceeded that way with reference to any other stockman.

Q. Yet there were other stockmen buying of the Indians, did the same as the Petersons didn't they?

A. It is a fact that other stockmen buy cattle yes but the other stockmen bought cattle by getting the Indian that sells to get a permit. That permit is given to the purchaser and is a bill of sale.

I don't mean to say a permit is given in all cases but it is issued in all legitimate sales. They had these rules under my predecessors.

Q. You don't pretend to say it is unusual for other stockmen to buy without a permit?

A. Well they might have done it in the past.

Q. It was nothing unusual.

A. No.

The regulations provided that they must get a permit. Out of this bunch that was brought in some Indians came down there and stated that they had sold such animals to the Petersons. I would say there were six or eight probably. In cases where there were no permits, according to the regulations, the Indian was required to pay the purchase price to the person who bought and the cattle were sold and the money paid to the owner.

Q. You stated you sold a number of head, many of which was turned back to the Petersons.

A. I sold a number of head, I forget the firm



now,—and the money was returned that the Petersons paid for the cattle, and the balance of the money was paid to the owner of the cattle.

After taking out the number of head that we turned out and the number that were turned back to the Petersons, I don't remember how many head that left that were sold.

Q. All the Indians who claimed they had lost stock were paid back their money for the stock?

A. Well no, not all of the Indians. All that had stock in that bunch were paid back.

Q. At that time you had not formed any opinion or purpose to prosecute the Petersons for stealing that stock?

(An objection is sustained to which defendants except.)

I remember the last trial of this case.

Q. Do you remember talking about this case when you returned to Browning in the Kipp Hotel when there were a large number of people around?

A. I don't know as I did. I don't remember.

I didn't say on that occasion that before I got through with them I would send the whole bunch to the penitentiary or break them. I didn't feel disappointed that Oscar and Melvin were acquitted. I never expressed an opinion that I felt very grateful that the old gentleman and the two boys were convicted. I feel that anyone violating the law should be punished. If they were guilty I did feel that way.

EXCUSED.

LEVI BURD, a witness called and sworn on behalf of the plaintiff testified as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Levi Burd, and I have lived at Browning on the Blackfeet Indian Reservation twenty years, north of the Agency about twenty miles. I know all of the defendants here, and Johnny Bostwick.

Along about the 21st of October, 1910, I had occasion to go by the Peterson ranch there upon the reservation. I went there to the Peterson ranch to see Melvin Peterson. When I got to their ranch I found Charles Peterson, Walter and Melvin and Mitchell Peterson, Johnny Bostwick and a couple of the little Bostwick boys. When I got there they were branding cattle in their corral. Mr. Charles Peterson had a book in his hand and seemed to be taking down notes. Johnny Bostwick and Mitchell were roping. Walter and Melvin were on the inside. I saw in the corral at that time that I am able to remember a 25 white faced steer, branded on the left ribs; a T anchor P steer and a  $\overline{OO}$  cow on the left hip and a 17 heifer. I could not say exactly now whether or not there was a cow there branded TS. I remember that at that time but it has been a long time ago. I would judge there were about ten or twelve head of cattle at that time in the corral. They left them there.

Q. What brands were put on them?

A. UJ on the right ribs and I think a DP on

the left ribs, I guess. That brand belongs to one of the Peterson boys as does also the lazy UJ. There wasn't a word said by me or them with reference to these cattle or the branding. The time I was there was in the afternoon. I was there about an hour. They finished branding before I left. They branded this 25 steer and this DP and this little steer, the others I don't remember. I had occasion about ten days afterwards to go to the Peterson ranches in company with Joe Brown. Upon that occasion we went to the Petersons north ranch and gathered some cattle brought them over to the south ranch and gathered some there. I think that Melvin and Walter was there when I got there. There may have been some more of the boys outside of our crowd. The only other person at the other ranch when I first went there was a man taking care of the place. I rounded up certain cattle there which were taken to Browning. I wasn't there at the time the animals were put through the chute and clipped.

Cross Examination.

(By MR. CARLETON.)

The first date that I speak of about being there was October 21, 1910, somewhere around there. There was some branding going on then. I know what stock it was that they were branding. There was a 25 steer in there, OO cow, 17 steer, T anchor P steer and several others I don't remember. I think that Walter and Melvin were doing the branding at that time. I think my memory is now so I can tell

you that those were the two. The time was right about dinner sometime. The branding was going on at their house.

Q. Did you have dinner? The whole thing was out in broad daylight?

A. Yes sir.

They didn't suspend operations because I came, everything went on just the same. I didn't have dinner with them. I am not an officer on the reservation and was not at that time. I went there because I wanted to see Melvin.

Q. You saw nothing to arouse your suspicions?

A. No sir.

That corral where they were branding is situated about a quarter of a mile from the road. Anybody can see from the road what is going on there if they look. This 17 animal I am sure was a cow. I was there about an hour. The matter of the stock was not discussed in any way. I transacted my business and went away and that is all there is to it.

With reference to taking down any brands my recollection is such that I can state pretty near what each and every person who was there was doing during the hour I was there. I wasn't with Melvin at all after the branding was over. I don't know whether Mr. Charles Peterson took down the brands in a book or not,—I said he was on the outside. He had a book in his hand but I don't know if he took them down or not. I don't know whether Walter was the one who did the writing or not, I

know Peterson had a book in his hand. I don't recollect whether I saw Mr. Peterson give Walter the book or not?

Q. You knew at the time that Mr. Peterson was a stockman and buying and selling stock and the transaction didn't impress itself upon you?

A. No sir.

Q. You saw nothing suspicious about it?

A. No sir.

Redirect Examination.

(By MR. FREEMAN.)

Q. Johnny Bostwick was there was he not assisting in roping the animals?

A. Yes sir.

Recross Examination.

(By MR. CARLETON.)

I didn't report anything about Johnny Bostwick or anybody else as a result of that visit.

EXCUSED.

JOE BROWN, a witness called on behalf of plaintiff being recalled for further cross examination, testified in substance as follows:

I have the book here which I gave you yesterday in which I said I took down the brands as I chuted the cattle.

Q. Now I notice just preceding that a list of some of the same stock on the two pages preceding. Will you tell us what it is?

A. Some of the same stock you say?

Q. Well is it?

A. No sir.



Not a head. The two pages of this book which have been marked by the stenographer for identification as exhibits one and two for the defendants were copied from the brand book by me and which brand book was held in the hand of Melvin Peterson there at the Agency. I told you that Melvin did have a list of some brands. That is not the list I referred to. What I refer to is a shipment of cattle which Melvin had on his book.

Q. Isn't some of Bostwick's stock in there?

A. No sir.

Q. Some Bostwick stock had been shipped before?

(This question is objected to by the District Attorney as not proper cross examination and the objection is sustained and the defendants except.)

Redirect Examination.

(BY MR. FREEMAN.)

Q. Among these cattle that were driven in from the defendants state whether or not there was an animal branded MF belonging to Frank Monroe.

BY MR. CARLETON: We object to that.

BY MR. FREEMAN: It is our object to show that at the time they went out there there was other stolen property in the possession of the defendants.

BY MR. CARLETON: We desire the record to show we object on the further ground that it is an attempt to prove an independent offense not charged here.

BY THE COURT: The objection is overruled. Exception by defendants.

A. Yes sir, there was.

Q. Of the property,—the MF, whose brand is that?

A. It belongs to Frank Monroe.

Q. State also whether or not there was an animal branded JT?

BY MR. CARLETON: Same objection as before.

BY THE COURT: Same ruling.

A. Yes sir, there was one cow with a JT on the left shoulder and a Y-K on the left ribs.

The JT brand belongs to Joe Tatsey.

Recross Examination.

(BY MR. CARLETON.)

I said the MF brand belongs to Frank Monroe, I didn't say the animal belonged to him.

Q. You don't know whether it had been sold or disposed of or not?

Objected to as not proper, objection sustained and exception noted.

I simply testified as to the JT brand. I don't pretend to say whose animal it was.

EXCUSED.

OLD ROCK, sworn on behalf of plaintiff testified through an interpreter in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Old Rock and I live at—south of the Agency on the Blackfeet Reservation. I don't know Charles Peterson and his two sons by their names. I think the man sitting over there between the two

boys is Charles Peterson (indicating the defendant Charles Peterson). I have got cattle.

Q. Can you tell us the brand of the cattle, your brand?

BY MR. CARLETON: Object to the question as incompetent, irrelevant and immaterial as no property of Old Rock is described in the indictment.

BY THE COURT: For the same reason the court has given that a person who is charged with receiving stolen goods, if it can be shown at the same time that he has other stolen goods, it is a circumstance that the jury can consider in finally determining whether he had guilty knowledge that the goods were stolen.

BY MR. CARLETON: Note our exception.

A. I can't call the brands by English myself.

Q. Can you make the brands for us?

A. I don't know the figures, I don't see very well.

The paper you show me marked Exhibit B is my brand. It is a Diamond, a half circle and a bar. That is what I put on my animals.

Q. I will get you to state whether you were down at the Agency the first part of November of 1910 about two years ago?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial and an attempt to prove a different offense and we are not prepared at this time to try that offense at this trial.

BY THE COURT: The objection will be overruled for the same reason as stated before.

BY MR. CARLETON: Note our exception.

A. I was.

Q. Did you find any of your cattle there?

BY MR. CARLETON: Objected to for the same reason as before stated and I wish it to be understood that the objection goes to the entire line of testimony on this point.

BY THE COURT: The objection will be overruled and an exception considered taken to all of it.

A. Yes sir.

Q. Where did you find it Old Rock, whereabouts?

A. In the government corral.

It was a steer. I never sold that steer that I found at the government corral, at the Agency.

BY THE COURT: What is this brand you have on Exhibit B?

BY MR. FREEMAN: It might be a diamond lazy P. Also lazy P diamond.

I never gave anybody permission to drive this steer away that I found there at the Agency. Nor did I ever authorize anyone to tell one of the Petersons that they could put an RK on this animal.

Cross Examination.

(BY MR. CARLETON.)

BY M. CARLETON: We now move to strike out all the testimony of this witness for the reason that it has no bearing on this case at all.

BY THE COURT: The motion is denied.

MR. CARLETON: Save an exception.

I don't know Johnny Bostwick, by that name, don't know any English names. I know his Indian name, which is One Leg. I didn't know One Leg came down there on the south side of the reservation where I live and stole a lot of cattle.

EXCUSED.

DAVE PAMBRUM, a witness sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Dave Pambrum and I live below, east of Browning, about four miles.

Q. Are you acquainted with Charles Peterson and his sons?

A. I know the boys, don't know the old man.

I own the T anchor P brand upon the reservation. This brand is on the shoulder and on the ribs alike, on the left side. I was called to the agency along the first of November, 1910. I saw some cattle of mine down there upon that occasion in the government corral. I saw a steer coming two years old with my brand on it. I hadn't ever before that time sold or disposed of that animal to any one.

BY MR. CARLETON: We object to the question as incompetent, irrelevant and immaterial.

BY THE COURT: Yes, let the objection go as to all testimony of this character and the same ruling will be made and an exception is considered taken to all of such testimony.

At the time that I recovered the animal there was another brand upon it besides my own. I don't



know whose brand it is but it belongs to one of the Petersons. I could recognize the brand if I saw it again. The paper you show me is the same brand that I saw there.

Q. Do you know the English name of that, whether it is called a DP or not?

A. Yes sir.

I never gave any person permission to put this other brand upon my animal known as the DP brand. I never gave any one permission to drive this animal from the range.

Q. Do you know where the Petersons live?

A. I have never been there but I have been close around there.

Their places are, approximately, about 18 to 20 miles from my place. I missed this animal when it first got away, but after that I never paid any attention to it. When I first missed it it was about August, 1910. When I found it it was at the agency corral. I have other cattle there on the reservation.

#### Cross Examination.

(BY MR. CARLETON.)

Q. You never accused any of these defendants of stealing it?

BY MR. FREEMAN: Object to that question whether he did or not.

Which said objection was by the court sustained and counsel for the defendant then and there duly excepted.

I don't know how long a period of time it was

from August 1, 1910, until I found the animal at the agency, but in August sometime. Sometime along in November I guess, I went to the agency. My steer was there with a lot of other cattle. He was driven with those other cattle. I didn't see anybody put the brand on him. All I know about it is that I simply went down there and saw this animal and it had in addition to my brand a DP brand. That is all I know about the case.

HENRY MARCEAU, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

BY MR. CARLETON: We object to any testimony given by this witness for the reason there is no Henry Marceau animal described in the indictment.

BY THE COURT: Objection overruled.

BY MR. CARLETON: Note our exception.

My name is Henry Marceau and I live on Milk River on the Blackfeet Indian Reservation. The brand for my cattle is HM on the left hip. Sometime in the fall of 1910 I was called down to the agency at Browning about an animal of mine. I went down to the agency.

Q. What did you find down there with reference to any of your own cattle?

A. One red cow of mine.

That cow had another brand on it beside my own brand, HM.

## Cross Examination.

(BY MR. CARLETON.)

Q. You never accused any of these defendants of stealing it?

BY MR. FREEMAN: Object to that question whether he did or not.

Which said objection was by the court sustained and counsel for the defendant then and there duly excepted.

I don't know how long a period of time it was from August 1, 1910, until I found the animal at the agency, but in August sometime. Sometime along in November I guess, I went to the agency. My steer was there with a lot of other cattle. He was driven there with those other cattle. I didn't see anybody put the brand on him. All I know about it is that I simply went down there and saw this animal and it had in addition to my brand a DP brand. That is all I know about the case.

HENRY MARCEAU, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

## Direct Examination.

(BY MR. FREEMAN.)

BY MR. CARLETON: We object to any testimony given by this witness for the reason there is no Henry Marceau animal described in the indictment.

BY THE COURT: Objection overruled.

BY MR. CARLETON: Note our objection.

My name is Henry Marceau and I live on Milk

River on the Blackfeet Indian Reservation. The brand for my cattle is HM on the left hip. Some-time in the fall of 1910 I was called down to the agency at Browning about an animal of mine. I went down to the agency.

Q. What did you find down there with reference to any of your own cattle?

A. One red cow of mine.

That cow had another brand on it beside my own brand, HM. I think the other brand was the RK brand. I had never sold that red cow to anyone, nor had I ever given anyone permission to put that RK brand on it.

Q. Did you ever tell anyone that they could drive this cow off from your place on the range where it was running?

A. Yes sir.

Q. Who did you tell he could drive it away?

A. I spoke to a fellow about the cow and he told me he drove the cow away from the range and I asked him why he drive the cow away.

Q. No, I mean did you ever tell anyone they could drive it away?

A. No, I didn't.

Cross Examination.

(BY MR. CARLETON.)

That brand, HM on the left shoulder, is my brand. I own this animal. Robert Hamilton didn't own it. I don't know whose brand HN is. The brand on this animal was HM. I don't know who put the RK on. I didn't see it put on, but I saw it on the

animal. All I know about the case is that I went down there, having missed this HM animal and I found it there and I got my money for it. The agent paid me. I didn't lose anything.

BROCKEY, sworn as a witness on behalf of the plaintiff through an interpreter testified in substance as follows:

BY MR. CARLETON: We admit that as to this character and line of testimony that the parties are the owners of the various brands and never gave anyone permission to drive the cattle away.

BY MR. FREEMAN: This was a cow. One of those testified to by Brown as being gathered in, branded P lazy S on the left hip and at the time that he recovered it at the agency corral had a Y-K brand on it.

BY MR. CARLETON: It is all admitted.

BY THE COURT: It will be understood it is objected to and an exception noted in each instance with this entire line of examination.

Whereupon the witness Eagle, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

BY THE COURT: What animal do you assign for this witness?

BY MR. FREEMAN: The animal branded ER on the left shoulder and a steer that he recovered from the agency corral in the first of November, 1910. The animal was driven from the ranches of the defendants and at the time he recovered it



it had the Y-K brand belonging to Maggie Peterson on it. The witness never sold the animal, never gave anyone permission to dispose of it.

BY MR. CARLETON: It is all admitted.

BY MR. FREEMAN: Ask him if he remembers how long before he found his animal at the agency corral it was that he missed it.

A. He says it was a young animal and when he found it it was quite a size.

Q. Where do you live on the Reservation with reference to the agency?

A. This side.

I don't know where the Petersons live, I only see them around town. I live south of the agency quite a ways.

YOUNG RUNNING CRANE, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Young Running Crane and I live at the old agency. I don't know what south is. I don't know about the miles, I couldn't say how far it is from where I live to Browning. It takes a quarter of a day to go there. I know Charles Peterson and his two boys that live on the reservation. I was called to the government corral there at Browning along about two years ago last fall to see about an animal that was in the corral with my brand on it. I saw some of my cattle, a steer.

Q. Did it have any other brand on it besides

yours?

A. All the brand I looked for was mine, I didn't notice any other brand.

I can tell my brand if I see it. That is my brand that you show me. That is an E2 connected at the top on the right shoulder. I never sold this steer that I found there at the agency corral to anyone. I never gave anyone permission to drive it away from where I live where it ranged down by the old agency.

DOUBLE CLOTH, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Double Cloth and I have some cattle over on the Blackfeet Indian Reservation. I was called over to the agency about two years ago last fall to see about an animal of mine that was there in the corral.

Q. What did you find over there?

A. My brand.

Q. What is your brand?

A. I can't pronounce it.

BY MR. CARLETON: We admit that DC is the brand of the witness, and that it had the Y-K on it. We admit she never did authorize anyone to do it.

I live thirty miles from the agency.

Q. Do you know Charles Peterson and his boys?

A. I don't know him.

DICK KIPP, sworn on behalf of the plaintiff

testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Dick Kipp and I live at Blackfeet about seven miles from the agency. I am not acquainted with Charles Peterson and his two sons that are on trial here. I know where they live.

Q. How far is it from where they live?

A. Well I can't say, quite a ways.

It would take a good days ride to go from my place. I have a recorded brand for my cattle. I can't read it, I don't know what they call it.

Q. I will show you a brand here.

(Counsel shows witness a brand.)

BY MR. CARLETON: We admit that this is his brand.

A. That is not my brand at all. (Referring to paper counsel showed him.)

That is my brand, on government's exhibit C. It is on the right side of the animal. I was called to the agency corral two years ago last fall to identify an animal of mine. They brought me there and they got the animal in the corral there. Jim Brown brought him in. I found an animal of mine there in the government corral.

Q. What other brand did he have besides your brand?

A. I don't know if it had any other brand or not. I had never sold that animal to anyone or given anyone permission to put any other brand upon it.

Q. Did you ever give anyone permission to drive

it off of the range?

A. I didn't stop them at all.

Q. I want to know whether you gave anyone permission to drive the animal any distance away?

A. No, sir.

BY THE COURT: What brand is this?

BY MR. FREEMAN: This is the lazy A-K.

Cross Examination.

(BY MR. CARLETON.)

All I know about this lawsuit or this animal is that I simply lost one animal and went over to the agency and found it, with my brand on it and got my money for it. That is all I know about it.

LOUIS MONROE, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Louis Monroe and I live at the head of Cut Bank on the Blackfeet Reservation. I live with my father. His brand is MF on the left thigh. I look after his cattle myself. My father was called up on the phone about two years ago last fall to see about an animal there in the agency corral and I went along. I didn't see the animal, my father saw it. I used the same brand as my father, the whole family has one brand.

Q. Did you sell an animal bearing the MF brand, could you when you wanted to?

A. I have to get a permit.

I can get the permit myself. I never sold any animal to the Petersons or to anyone else bearing

an RK brand.

Cross Examination.

(BY MR. CARLETON.)

I have the same brand and it is recorded at the agency and I sell cattle myself. When I sell my own cattle branded with my own brand I don't have to get authority from my father. I know Walter Peterson. I don't remember of selling an animal to him about the time I lost mine and getting \$18 for it. I know Oscar Boy. My mother does not speak English. I don't know of that animal being sold and my father being paid \$18 for it by Walter Peterson. My mother didn't tell me that. I didn't know that Walter bought some MF cattle. I wasn't down at the corral. I don't know anything about the cattle down there. I was up at the office. I didn't see this MF animal at the agency.

Q. Do you know it was there?

A. Yes sir.

Q. How do you know it was?

A. My father told me.

BY MR CARLETON: We move to strike out all the testimony of the witness on the ground that it was hearsay. Which said motion was by the court denied and defendant saved an exception.

FRANK MONROE, sworn on behalf of the plaintiff testified in substance as follows:

My name is Frank Monroe and I live at Cut Bank. My brand is the MF brand, on the left thigh, maybe, I don't know exactly. I forget whether it is on the right or left side. I went over.



to the agency two years ago last fall to see about a cow of mine. I found a cow of mine there in the corral. I had never sold that animal. There was no brand on it. I couldn't make out what it was. It was on top of my brand. I never gave anybody permission to put any brand on my cow except the MF.

Q. How long before you found this cow over at the agency had you lost her if you remember?

A. Quite a while ago.

I live fifteen miles from Petersons.

Cross Examination.

(BY MR. CARLETON.)

I am sixty-eight years old. The new brand that I saw on my cow was on top of the old brand and a little to one side. I couldn't make out the new brand that was on my cow. I know Walter Peterson, sitting here. I have a son Louis who has just testified. Louis sells his own cattle. I don't know that Louis, my son, sold this very animal to Walter Peterson. He didn't tell me that.

Q. Do you remember when you testified about this at the other trial?

A. Yes, sir.

Q. Were you asked this question and did you give this answer at the other trial: "Q. Didn't Louis tell you he sold this cow to Walter about a year ago? A. I can't tell; I don't know that."?

A. Yes, I didn't give it to him.

I have been losing cattle right along. All I know about the defendants here having anything to do

with this animal is that I simply lost it and I went over the Agency and found it with the other brand and the agent gave me my money for it that is all I know about it.

JOE TATSEY, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Joe Tatsey and I live on the Black-foot Indian Reservation, about thirty-five miles south of Browning. I am acquainted with Charles Peterson and know where the Petersons live. They live about sixteen or eighteen miles north of Browning. It is approximately fifty miles from their place to my place. My brand is JT on the left shoulder. When I was called to the agency about two years ago last fall, I found a cow and a calf. The JT brand was on the cow and also Peterson's brand. There was no brand on the calf. I had never sold that cow to anyone before nor given anyone permission to drive it away from the ranch. I had not give anyone permission to put any other brand on it particularly the Y—K. That was my animal I found there. I don't remember how long it was since I missed the animal. I have some distinct recollection of the animal now as I saw it there. At that time I had other cattle running there on the range. They had ranged close around my place.

Cross Examination.

(By MR. CARLETON.)

All I know about this case is that I lost this

animal and went over there and found it with some Peterson brand on it and got my money for it.

Q. You never blamed the Petersons at all in connection with the matter did you?

The court sustained an objection to this question and counsel for the defendants then and there duly excepted.

All I did was to go over there and identify my animal and get my money.

PHILLIP FLAT TAIL, sworn on behalf of the plaintiff testified in substance as follows:

My name is Phillip Flat Tail and I live twenty miles south of the agency on the reservation. I know Charles Peterson, he lives on the north side, quite a ways from my place, I don't know how many miles. I look after my father's brand there on the reservation. I can tell you this brand if I see it.

on it. (Counsel shows witness paper).

A. That's it.

My father's brand is on the right shoulder. My father is dead. I was called over to the agency about two years ago last fall in connection with an animal having my father's brand on it.

Q. What did you find when you got over to the agency corral?

A. Found a cow, an animal.

Q. Was it a cow or a steer?

A. Steer.

Charles Peterson's brand was on the steer. If you showed me the brand I might be able to tell you

the name of it.

Q. This brand I show you (showing witness paper.)

A. That is the brand.

I never sold the animal nor gave anyone permission to drive it away. I never gave permission to anyone to put this Y—K on it. The animal was a year old when we missed it.

Cross Examination.

(By MR. CARLETON.)

All I know about this animal is that I lost one or my father or family lost one and I went over there to the agency and found it and got my money for the animal; that is all I know about it.

ALBERT GOSS, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Albert Goss and I have lived at Browning twenty-two years. With Joe Brown and some other men I went out to the Peterson ranches along the last of October, 1910 for the purpose of making a roundup. The first place that we went to Mr. Lytle and a man by the name of Joe Coyle went with me; we came back from there to the north fork and then we were all together there. We didn't see any of the Petersons at the North Fork ranch, not until we came back to the home ranch. There was there at the home ranch at that time Mitchell and Walter Peterson, who were in the field. I didn't go into the house.

Q. What did you do with the cattle that you gathered at these places?

BY MR. CARLETON: We object as to all cattle except those in controversy here.

Which objection was by the Court overruled and counsel for the defendant then and there duly excepted.

A. We took them to the agency.

I think there was somewhere along about eighty head I guess in that bunch that we took to the agency. After we got to the agency we ran them through a chute in order to identify the brands upon them.

Q. Who was it that ran them through the chute, who was present?

A. Joe Brown and two of the Peterson boys, myself, Matt. Lytle, Joe McKnight and Malcolm Clark. Joe Brown took down the list of brands as they went through the chute.

Q. State whether or not there was any difference of opinion between all of you there including the Petersons as to the brands that were upon these animals and which Joe Brown put down in his book?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the Court overruled to which counsel for the defendant duly excepted.

A. There was no difference of opinion.

Mitchell and Walter Peterson were working in the field at the time I went there. We stayed be-



hind to bring up a little bunch we got at the North Fork. These cattle were inside of the field. They call the ranch on the south fork the home ranch.

Cross Examination.

(By MR. CARLETON.)

I don't know anything about the branding. Joe Brown, Matt Lytle, myself, and there were several others around, I don't remember their names. Mitchell and Walter Peterson were there at the time the cattle were clipped in the corral. They were all there together assisting in the work, as readily and cheerfully as anybody else and there was no trouble among any of us. When the cattle went through the chute the hair would be clipped off and that would reveal the brand. As the brand was disclosed Joe Brown would put it down. I don't want to be understood that there were eighty head down there. I remember what I testified to before, at the first trial. My memory would be better then than now. When we went down there to the home ranch we found that bunch that the Major sent us out to gather. Joe McKnight was with me when I came to the home ranch. I rode down there in the daytime and found Melvin Peterson and the other Peterson boys there, all three, Mitchell and Walter. They were working cattle out in the field, some of the very cattle I took over. It was broad daylight and the field was in plain sight of the road, anybody could see it. I don't know that they were trying to hide anything in that field. I am an Indian. I was there at the home ranch on this

occasion with this man about three hours.

Q. What were you doing all this time?

A. Holding the cattle.

We drove a whole bunch in there. We drove in eight or ten head in there which we got on the North Fork. These were cattle with the Peterson brand. We were after nothing except those that bore the Peterson brand and other brands. I took everything of that kind I found. When Walter and Mitchell saw me and Joe McKnight I didn't talk with them about this stock, never said a word. I didn't ask them what they stole this stock for. They didn't ask me what I was there for. They were not talking to me at all.

Redirect Examination.

(By MR. FREEMAN.)

At the time I got to the home ranch Joe Brown and some of the rest of them were there ahead of me. I and McKnight came up from the North Fork with a small bunch and met the balance of the boys there and from thereon we were all together and drove the cattle over to the agency.

MATT LYTLE, sworn as a witness on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Matt Lytle and I live at Blackfoot and am a stockman and have been engaged in the raising of both cattle and horses. I was one of the parties sent out to round up cattle with the Peterson brand in 1910. I went with Joe Brown. I

went to the north fork ranch, next to the Canada line with Mr. Doyle and Albert Goss. Mr. Doyle is dead now. I didn't get any cattle at the North Fork ranch. I didn't see anybody there in charge of the place. From that place we went to the North Fork.

Q. Who did you find there?

A. I don't know his name.

There was somebody in charge there. None of the Petersons were there. We gathered some of the cattle that we were sent out to gather at that ranch, nine or ten head. From the North Fork we went over to the South Fork. From the North Fork to the South Fork is twelve to fifteen miles. The South Fork is called the home ranch. There we found Joe Brown and the Peterson boys. I remember Walter was there, and other Peterson boys were there but I don't remember which ones. When I got there they were just eating dinner. Cattle were rounded up there. These cattle that we rounded up there we cut out what we wanted of them and took them to the agency. I helped drive them all the way, Robert Goss assisted me in driving them. Dave Claire was with us. When we got to the agency we put the cattle in a chute and clipped them. While we were doing that Albert Goss, Joe Brown, Dave Claire and a couple of Peterson boys, I wouldn't say which ones, but I remember two of them, were there at the time.

Q. What have you to say as to whether or not you all agreed as to the brands that were upon these

cattle as they went through the chute.

BY MR. CARLETON: Object as incompetent, irrelevant and immaterial.

Which said objection was by the Court overruled and counsel for the defendant then and there duly excepted.

A. They all agreed on the brands.

Joe Brown put the brands down.

Cross Examination.

(By MR. CARLETON.)

I know Sol Davis or William Davis. I couldn't say whether he was there or not. I would know him if I saw him. I know Douglass but I couldn't say whether he was there or not, but I don't think he was. I might have been there at some time when Davis and Douglass were there with reference to what brands were on some of these animals. I said I took to the corral seventy-five or eighty head. As near as I remember that is the number I gave you at the first trial. I don't exactly recall that all of us agreed on the first trial that there were sixty-seven head, the same number that Mr. Brown gave us yesterday when he was on the stand. We ran the bunch through the chute to determine the brands, the whole bunch. By running the whole bunch through you could clip off the hair and then readily determine the brand.

Q. Are you positive about that?

A. Yes sir we ran one through at a time.

I have a distinct recollection of running them through when I was there. From that distinct



recollection I could tell you whether a count was kept of the number or not. I don't remember what the count did show, every head of cattle was run through the chute.

Q. Isn't it a fact that some were not run through the chute at all and you so stated at the other trial?

A. There might have been.

Q. Do you know now?

A. No sir.

By cattle milling is meant running around and getting wild and ugly. These cattle got wild and ugly and began to mill before we finished chuting. I don't remember whether those that got wild and ugly were run through the chute or not. When we came down to the home ranch we found someone eating dinner and they invited us in and we had our dinner. Billy Haggerty was with me. We stayed in the field there until we got through working, about an hour, maybe two hours. We were cutting out cattle, cattle that we were sent out for, those that bore other brands than the Peterson brands. The Peterson boys assisted us. This field is close to the public highway where everybody could see what is going on. I am an Indian, and belong to the tribe and am carried on the rolls. I heard no talk with reference to the object of that bunch of people coming down there. The boys made no objection to helping me cut them out. All I know about these animals described in the indictment here, some sixteen or seventeen, is that I found them down there bearing the Peterson brand. I don't



know under what circumstances they came there or how or why, I don't know anything about that.

JOE BROWN, recalled for further testimony on the part of the plaintiff testified in substance as follows:

The cattle that I decribed on my redirect examination as one steer branded 25 on the left ribs, the property of Calf Looking, was what is known as ID stuff. The ID brand is on that. The same is true of a cow branded 17 on the left ribs the property of Bad Marriage, and likewise the animal branded TS on the left ribs; the property of Catches Two. Likewise the cow branded  $\overline{OO}$  on the left hip, the property of Henry No Bear; also a cow branded O on the left thigh, the property of Little Buffalo Stone. There were no permits issued for the sale of any of the property you have just described to me.

Q. What does ID stuff mean, what brand?

A. That is the Indian Department brand.

It means stock which has been issued by the Indian Department to the Indians and covers the increase of that stock.

Cross Examination.

(By MR. CARLETON.)

The book that I testified from shows this ID stock in all cases.

JOHN BOSTWICK, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

My name is John Bostwick and I live on the

Blackfeet Reservation and am a member of the tribe, and was living there in the year 1910. I am acquainted with the defendants Charles Peterson and his two sons and have known them off and on all my life. I did work for the Petersons during the year 1910. I started along in September and quit in October, working about six weeks on the roundup. I rode on the roundup then.

Q. I will ask you to state whether or not you drove to the Peterson ranch in July, whether you sold to any of the Petersons in the month of July some cattle?

A. Yes sir.

I sold these cattle at Browning, to Mitchell Peterson, the transaction involved four head.

Q. And who were you paid by and how much?

BY MR. CARLETON: We object unless it is shown that they are cattle that are described in the indictment, otherwise the question is irrelevant and immaterial.

BY MR. FREEMAN: This is relative to the fourth count.

COURT: Overruled.

MR. CARLETON: Exception.

I was paid \$130 by Mitchell Peterson and I gave him \$10 back. He paid me by check, signed by his father. Exhibit "D" which you show me, is the check. There wasn't any conversation only I said I wanted to sell the cattle and he said all right. There wasn't any conversation that I can remember of with Mitchell Peterson concerning the subject

of the sale of these cattle before this time in July. That was about the 4th of July, I don't remember anything before that. I don't remember the brands of the cattle at all.

Q. Remember anything concerning the Bryan Connelly steer?

A. That was picked up on the roundup several months after that.

This Bryan Connelly steer was picked up on the roundup two or three months afterwards and his brand was on there and Mitchell told him he got the steer from me. He fetched the steer down there and asked me if I sold it and I said I didn't know. After Bryan Connelly brought the steer down I had some conversation with Mitchell Peterson concerning this Bryan Connelly steer. I went there and asked him if Bryan got the steer out of his herd and if Bryan had claimed that they had got the steer from me and he said yes and I said let him have the steer back and I will make it right with Mitchell. There was talk also about the Joe Cobell steer. The talk was about the same. Mitchell claimed that was one I gave him on the 4th of July and I got it back and I allowed Mitchell sixty dollars for these two steers. That was on the roundup, I don't know the date. It was sometime while I was working for the Petersons.

Q. Where did you get these four head of cattle that you sold to Mitchell Peterson as you say?

An objection to this question was overruled and defendants excepted.

A. I picked them up on the range and sold them to Mitchell. I didn't purchase them. I helped brand these cattle. I think it was the same day that we branded them, he bought them just above Browning. I think Oscar Mitchell and somebody else was present at the branding. I guess Charles Peterson was on the home ranch at the time that he gave this check to me. I didn't see him. He lives 18 or 20 miles from Browning. I sold this one to Mitchell Peterson the same day I got the check. I wouldn't say for sure what brands were put upon these four head of cattle at that time, but I think a DP and UJ. I couldn't say that they were evenly divided. The UJ brand I think belongs to Mitchell and the DP also I think, I wouldn't say for sure. I remember after the fore part of July of disposing of other property to the Petersons in the month of July, the latter part, there were seven head. I picked these cattle up on the range on the south side. After I picked them up I took them to the Peterson ranch and sold them, to their home ranch. Miles Running Wolf assisted me in driving these cattle, I got Miles at Browning. He didn't have anything to do with picking up the cattle, I picked him up in Browning on Sunday morning. I brought the cattle into Browning myself. I didn't purchase any of these cattle from anyone. I simply gathered them up. When I went to the Peterson ranch Mitchell and the old man was there, and I think Walter and Oscar. I just brought the cattle there and told Mitchell he could buy them.



He said he would see the old man and he saw him and said the old man said he would take them. The old man paid me. I don't think I had a conversation with Charles Peterson. There are several ways of going to the home ranch of Charles Peterson. I went in through the southeast side of the ranch. I didn't meet anybody before going there. When I got to the place I put the cattle in the corral. This times Miles corraled them, the other boys were there but we didn't need any help. Miles helped me put them in the corral and the other boys came there and I don't remember Oscar or Walter or Mitchell. We put our horses up as I wanted to go back to Browning that same night. I don't know whether we had supper before we left or not. They branded before I left. I don't know whether it was before or after supper that I made the bargain, it seems as though it was after supper. Mitchell just went down and looked at the cattle and wanted to know what I wanted for them and I told him and he said alright that the old man would take them, I don't know whether it was before or after supper, anyway, along about that time. We branded the cattle and after we got through I went back to Browning.

Charles Peterson gave me a check for them. I don't just remember the amount of the check, but I think it was \$210. Government's exhibits "E" and "F", which you show me, I guess are the checks, I don't remember whether there was two but I guess there was though. The date of these



checks is August 1, 1910, must be along about the time I got the checks at the time I took the cattle there. I think the reason was that I got two checks that I told him to give me as small checks as he could because I couldn't change them in Browning. I don't remember now what brands were on these seven head of cattle that I took there the last part of July, 1910. I might remember the animals if they were read out to me, but I couldn't give the brands now. On this bunch of cattle that I sold in July I didn't give Mitchell any bill of sale of any of the cattle I sold the last of July. I didn't deliver to him any permits issued by the superintendent of livestock for the transfer of sale of personal property on the reservation. Nothing was said by me to Mitchell or by Mitchell to me about a bill of sale. He didn't ask for a bill of sale.

Q. Did he make any inquiries as to where you got this property.

A. Well he just asked me and I said, over on the south side, that was all I told him.

Nobody took a list of the brands on the first of July unless Mitchell took them himself. I didn't notice whether he did or not. When I turned this property over to him I didn't turn over a list of the brands of the property. On the last of July, I think Oscar and Walter were present and Mr. Peterson himself. I and Oscar did the roping. I think Mitchell did the branding. I don't remember what brands were put on these cattle. I know the Petersons' brand generally, they have six or seven

brands, but I don't know what they put on, but someone of the Petersons' brands. I don't remember whether or not any list of the brands was taken by any one when the branding was done there on the last of July. At the time Mr. Peterson gave me this check for \$210 he didn't ask for any bill of sale. He didn't ask me whether or not I had permits from the Agent. I didn't give him any bill of sale, nor did I deliver to him permits for the sale of this property. There was nothing said to me there by anyone at that time as to what brands were upon these seven head of cattle I delivered at that time to him. After the 29th or after the last day of July, 1910, I drove other cattle to the Peterson ranch, it must have been the latter part of August sometime. There were 16 or 17 head in this bunch, I think, which I had got on the south side of the reservation. Mose Henault assisted me in driving them to the Peterson place. He had nothing to do with the picking up of the property out on the range. I simply hired him to help me take them out. We came in on to the Peterson ranch on the southeast side. It must have been along about two or three o'clock I guess, when I got to the Peterson ranch with this bunch of seven head that Miles Running Wolf assisted me in driving in. That's what I say, I got there along about two or three o'clock and I might have branded them before supper, I wouldn't say which, but we branded them before I left there; that evening I left there and went back to Browning.

Q. Didn't you get there along a little later in the afternoon?

A. Well, it might have been a little later than three or four o'clock.

We branded about two or three o'clock, it might have been later. We arrived with this bunch of seventeen head along in the evening sometime. I met Walter Peterson before going to the Peterson ranch, up on the hill, he was driving a horse into the pasture. Nothing took place then, he just fell in with us as we were taking these cattle to the ranch. When we got to the ranch we put them in the corral, Mose Henault and I guess Walter might have helped me. After we put them in the corral we put our horses in the stable and fed them. I don't know whether we went back to the corral or not. I saw Mitchell there sometime, I don't know if we had supper first or not. I made a bargain with Mitchell and sold him the cattle and Mr. Peterson paid me. That was after supper and then I went home. Charles Peterson paid me for the cattle, \$350. He owed me \$150 on the cattle then. I think government's exhibits G and H, which you show me, are the checks given me by Charles Peterson on that occasion, dated August 30, 1910, each for \$175.

The reason for the two checks was that I didn't want them too large. I wanted three and he said he only had two blanks left. Some of the 16 or 17 head I drove there upon that occasion I bought, I guess about half of them, but I don't just re-

member, how many. That would mean about eight that I simply picked up on the ranch. I can't remember the brands now that were on those cattle that I took there the last of August, 1910. I made no list of the brands at the time. Before the time I sold these cattle I had not delivered any bill of sale to Charles Peterson nor did he ask me for any at the time nor for any permits. He didn't ask me where I got them. I didn't tell him anything. I didn't stay for that branding, I think I figured it out that evening. I didn't want to stay because I wanted to go home and it was getting toward evening. With reference to this delivery when he paid me the \$350, he told me he was a little short and wanted me to let him off for that amount and I told him that was all right with me. I went to work for the Petersons on the 6th or 7th of September. I made the arrangements to go to work for them about a month before, with Walter and Mitchell and I think the old man too. When I went to work for them we didn't set any price but they paid me \$60 for the six weeks. I was present at the corral there on the Peterson home ranch about the 21st of October, the time when Levi Burd came there while some cattle were being branded.

Q. Tell us where these cattle came from that were in the corral on that occasion?

A. They came from the roundup.

At this time there were 6 or 7 head, I think, something like that, that were in the corral at that time. I remember a steer in that bunch branded



25 on the left ribs, which I had fetched from the other roundup.

Q. Whereabouts on the roundup, who was with you?

A. Oh I can't remember, there was fifteen to twenty riders riding,—over near the railroad.

Q. Do you remember among that bunch a cow branded 17 on the left ribs?

This question was objected to as outside the issue in the case, which objection was overruled and defendants excepted.

A. Picked her up on the roundup.

I don't just remember where I did pick up that 17 cow. There were 5 or 6 other animals in that bunch that I picked up there upon that occasion. I picked them up on the roundup. We picked up everything what were strays. I remember a cow branded TS on the left thigh, the property of Catches Two.

Q. Where did you pick up that animal?

A. That was picked up on the roundup.

Q. A cow branded  $\overline{OO}$  on the left hip, the property of Henry No Bear.

A. Picked up on the roundup.

The roundup quit along about the 18th or 19th of October, I think. These four head of cattle that you have described were left at the time the roundup quit in Levi Burd's field.

Q. What other cattle was in there at the same time?

This was objected to as incompetent, irrelevant



and immaterial. The court overruled the objection and defendants excepted.

A. Peterson cattle, Haggerty cattle and other cattle that was rounded up on the roundup, everyone's cattle.

These cattle were taken out from the field by all the different owners coming down there and rounding up that field and cutting out their stock. Wetzel, Burd, Haggerty and a hired man by the name of Albert Hall cut out what belonged to them. When they went to the field Mitchell, Melvin and Walter Peterson went also We four fellows rounded up the field and cut out Peterson cattle and the others cut their out. We cut out these four head of cattle which were in with the Peterson cattle.

Q. Were there any besides these four head with the Peterson cattle?

A. Might have been, 6 or 7 head of cattle in there at that time.

I don't think we did put any of the cattle in the corral at that time, we had the Peterson's brand.

After we got home the Peterson cattle were put in the field. We threw these other 6 or 7 head in the field with the Peterson cattle. Then we went out that afternoon and rounded up the lower side of the Peterson coulee and picked up some more. It was the next day I believe that we put these 6 or 7 head in the corral, after they had been brought over from the Burd field. When we brought them over from the Burd field we threw them in the Peterson field. We went home that night and the

next day came down. Then we gathered up the field and cut the cattle we wanted to brand and branded them, the cattle the Petersons wanted to brand. I had some to take home that belonged to some Indians up above there. As a matter of fact I put about 7 head in the corral the next day after I got back. These were all branded after we got them into the corral. I don't know what brands were put on them. I think DP and UJ, maybe a Y—K, I don't know for sure. With reference to these 6 or 7 head of cattle that were rounded up in the corral and branded at that time, I just told Mitchell I wanted to sell them to him. He said all right. There were some 6 or 7 head, and I think they had some in there they had bought from somebody else that they wanted to brand, one or two of Melvin's I think. The old man paid me. Government's exhibit L I guess is the check that was given me by Charles Peterson on the occasion of the sale of this 6 or 7 head of cattle. It is a check for \$65.00, signed by Mitchell Peterson, but Charles Peterson gave it to me. At the time that I delivered these cattle or branded them I didn't deliver to Mitchell Peterson or to any member of the Peterson family a bill of sale nor any permits. No one asked me for a bill of sale or for any permits. At the time these cattle were branded I think I and Mitchell did the roping, and I think it was Walter who did the branding. I think Melvin was there. I don't know whether or not any list of brands of these cattle were taken. I don't know whether

Charles Peterson on that occasion had a book in his hand or not, but I think he was outside of the corral, handing in the irons. At the time I took this 16 or 17 head there wasn't any list taken of the brands at that time that I know of. I wasn't there when they were branding them.

Q. Can you give us a description of any other cattle of this 6 or 7 head branded there on the 21st of October besides the 25 and the 17 and the TS and the  $\overline{\text{OO}}$ ?

Objection to this question on the ground that it is incompetent and leading was overruled and defendants excepted.

A. Yes, an R steer I think, and an MW cow, and the T anchor P steer.

I first saw the T anchor P steer in Burd's field. was working the herd down there and I saw that he had a dim brand on him.

BY MR. CARLETON: We object to all testimony regarding this steer as outside of the issues in this case.

Objection overruled and defendants except.

A. I noticed it had a dim brand on and I couldn't make out what it was and I think I called Melvin to look at him and he couldn't make it out either. Anyhow there was a dim brand. I wanted to see what it was so we cut him out of the herd and throwed him to see what it was and either me or Melvin, don't remember which one of us took him on over to the ranch and put him in the other herd. He kept lagging back of the bunch, was

kind of a lazy steer and we noticed him. Someone in the bunch kind of asked who owned the steer and I spoke up and said I did.

BY THE COURT: Who was the bunch?

A. Well, there was Paul and Melvin and Walter and myself and Mitchell.

Before that took place Mitchell had went in the coulee with Levi Burd to get this R steer, it was lost up in some coulee and he caught up with us after they got it. He turned the R steer in with the balance of them. This steer was lagging behind and someone asked who owned this steer and I spoke up and said I did. The brand had not been examined on that occasion. I said I owned him Mitchell says, I think, "what do you want for him," and I told him \$15. He asked me what he had on him and I told him I didn't know. I told him we will go down to the field and throw him and see what he had on him. We examined him and saw it was a T anchor P steer and let it go, after we saw what it was. We let it go because we didn't want to bother with it, seeing we knew who owned the steer, until the next day, and then we took the steer the next day, the next day after we throwed it in the field, we got thinking it over and thought it looked easy and we would take him. The T anchor P brand belongs to Dave Pambrum. Nothing further was said about the T anchor P steer at that time; we let him go then. The next day we were cutting out these other cattle and this steer was standing on the edge of the herd there and we talk-

ed about him; myself and Mitchell. I don't know what we did say. Mitchell says "what about this T anchor P," or something in regard to the steer and I said, "If you want to take a chance on it we will call it square on this \$18 I owe you on the blackjack game." I says "If you want to take a chance we will take him and call it square and if anything comes up I may be able to fix it anyhow with Dave." I square up the blackjack game with Mitchell with this steer.

Dave Pambrum lives about four miles below Browning and I am well acquainted with him and so is Mitchell. I didn't have any conversation with any of these defendants with reference to this R steer, only to cut him out of this herd and brand him.

Q. Going back to the time when you got those two steers, one belonging to Joe Cobell and the other to Bryan Connelly, on what basis did you make this good?

A. Sixty dollars.

Q. How did you settle for that with the Petersons?

A. Well they owed me a hundred and fifty dollars. I just took sixty dollars off that one hundred and fifty.

Q. How long was that straightened up before you quit working for them?

A. Well that was during the time we was on the roundup the first time they found these two steers. Had been out three or four weeks.



This was about two or three weeks before the roundup disbanded.

Q. Did you ever have any understanding with Mitchell, during July and August, any sort of a general understanding about the purchase of cattle from you?

A. No, not in particular.

Q. Well what was ever said by either of you or he concerning that matter?

A. I don't know as anything was said that I remember of. I never said anything to Mitchell concerning these different bunches of cattle generally as to where I got them.

Q. Well didn't you have some conversation about some of this stock as to whether it was right or not?

A. Well as to the last bunch there might have been something said.

Q. But was there anything said by you or anyone else?

A. I can't remember how that came up. I don't remember whether there was or not.

Among these several bunches of cattle that I delivered to the Peterson ranch, I have already testified that there was a T anchor P steer, and there was also an MW, which was delivered in the last bunch. I bought that cow from Miles Running Wolf. The steer branded 25 on the left ribs, was also in the last bunch; also a cow branded TS on the left hip.

Q. Steer branded lazy FY on the right hip?

A. I don't remember that one.

Q. Do you remember a steer branded 7 P bench E on the right hip?

A. I think I remember that, that isn't the last bunch.

I don't remember an animal branded CE on the right shoulder as being in any of these four bunches of cattle that I delivered there; I remember a cow branded A P lazy S on the left hip, which was among one of the four bunches. I think a cow branded 30 on the right hip was one of them. I don't remember a cow branded  $\overline{12}$  on the left shoulder. A cow branded  $\overline{OO}$  on the left hip was one of them; also a cow branded R on the right shoulder.

Q. Isn't that the same one that we called a steer? That is the R brand isn't it?

A. Yes sir.

This was a different animal than this R steer I speak of. A. YP steer on the left hip I think was one of them, I am not sure.

Among the cattle delivered in these four bunches there was a cow branded O on the left hip, also a cow branded 17 on the left ribs. I don't remember a CZ on the right shoulder. There was also a cow branded  $\overline{21}$ . I don't remember the 23 steer on the left hip, nor a steer branded JT or DT on the left shoulder. I plead guilty to the offence of stealing these cattle that I have testified about here. In 1910, and previous to that time my business on the reservation was riding generally.

I had no place of my own previous to that time, I made my home at my brother's. I live 5 or 6 miles west of Petersons.

Cross Examination.

(By MR. CARLETON.)

I was not born on the reservation but have lived there going on 15 years now. I make my home with my brother, Frank Bostwick, and have had my home there all this time until this last year. My brother lives five miles from the Petersons.

Q. You were neighbors and friendly?

A. Friendly.

I had known the Petersons a long time. I hadn't stolen any stock previous to the time mentioned by Mr. Freeman.

But I had dealt with stock. I had never been accused or arrested for stealing stock before these times. At the times mentioned by Mr. Freeman I had deposits in the Kalispell National Bank, and I issued checks on that bank. I am 38 years old and unmarried. My brother is a married man and has a family. I mentioned that I bought cattle of Miles Running Wolf and paid for them. I had no permit for that nor did I give any bill of sale for that, I got the animal in a trade. I sold it to Mitchell Peterson and I didn't give him any bill of sale and he didn't ask me for any. This deal was perfectly straight and honest. There were a number of other cattle the same way.

Q. And he didn't ask you anything about that?

A. No sir.

Q. Was the transaction any different as to these that were straight than those that were not?

A. No sir.

Q. Was there anything in the transaction as far as you knew that would lead Charles Peterson to suspect that any of these others were stolen any more than the Miles Running Wolf or others that were straight?

A. No sir.

With reference to Walter it was the same and with reference to Mitchell it was the same, except the blackjack game steer.

My testimony is that there were four several bunches of cattle sold at four different times. I never in my life sold an animal to Walter Peterson or had any dealings with him about cattle. I never received a cent from Walter Peterson for any of this or for any stock. He had nothing to do with these cattle as to their purchase or payment, nor was he connected with the transaction in any way so far as I know. I am the man that handled them and sold them. I hadn't any partner in the transaction so far as stealing them or selling them was concerned. I had sold cattle before the times mentioned by Mr. Freeman to different people.. Had sold to a man by the name of Wetzel and had had trouble over them. I had also sold some cattle to Levi Burd and bought some from him and never had any trouble about them. This was before the Peterson cattle transaction. There were also a number of others with whom I had business trans-

actions of that kind before I had had these transactions with the Petersons. I never had any trouble at all about them. Nobody made any complaint so far as I know. The first bunch were sold at Browning somewhere about the 1st of July, 1910. I don't know what character of cattle they were. They were delivered there and turned over to Mitchell in the town of Browning. That transaction was had with Mitchell. He was the only one of the Petersons with whom I had any dealings concerning that transaction. There were four head of two year old steers in that bunch and I was paid \$30 a head for them or \$120 for the four. That was a fair price for the cattle. So far as Mitchell Peterson knew that transaction was just as straight as the one with reference to the Miles Running Wolf animal. There was nothing said or done by me to put Mitchell on his guard as to the animals. The time of this transaction was about the Fourth of July, I wouldn't say for sure.

The second delivery to the Petersons was along about the 30th of August. There were 7 head in that bunch. I guess these were all ages, cows and steers I think, I don't remember the number of each. I received for them \$30 a head, \$210, as shown by the two checks which I have identified. That was a fair price for those cattle.

Q. You wouldn't expect to get any more if you had raised them yourself and they were absolutley your own?

A. I might have bought them for ten and sold



them for twenty.

Q. You wouldn't have expected to get any more if you had owned them, at thirty dollars ahead?

A. Not if I sold them on the Reservation, if I sold to a buyer I might.

I assisted in delivering those 7 head at the ranch. The bunch of four were delivered at Browning, and were branded there. They were branded in broad daylight, only about one-half a mile from the agent's office, where anybody could see us. There was no concealment about the branding. I helped deliver the bunch there. Miles Running Wolf was with me. The cattle were in the corral right near the public highway, where everybody could have seen them if they noticed the place, and anybody passing there could see the cattle. There was no attempt to conceal them on the part of the Petersons, everything was done in the broad daylight.

I was paid in full and that transaction was closed. The amount paid, \$210, I say is a fair price. The Petersons brought the four head out from Browning themselves. The seven head were branded out in the field. The third bunch was a bunch of 16 or 17 head. The sum that I received for that bunch, which was \$500, was a fair price. This price I guess averaged about the same as the other bunches. I received in payment two \$175 checks, which I have identified, leaving a balance of \$150 unpaid on that purchase. I tell you that they were two steers, one of Cobell's and one of Connelly's

which were taken away and there was deducted from that balance of \$150 that Peterson owned me the sum of \$60 allowed for the two steers. That left a balance of \$90 due me. I subsequently had a settlement with Mr. Peterson for the balance of \$90 so that it was all squared up. I worked for Mr. Peterson a while. I received other payments, of money from him besides the \$60 in wages, upon that account until it was finally all paid.

Q. And the whole matter was satisfactorily adjusted according to your agreement for the \$500?

A. Yes, sir.

The transaction concerning the fourth and last bunch was about the 20th of October, 1910. In that bunch I think there were six or seven head, but I am not positive which. If I stated at the other trial there were six, my memory would be better then about the matter than now. Just as I said, we got this bunch out of the Burd field. The cattle were of average age.

Q. What was the contract price for this bunch?

A. I think two hundred and fifteen dollars.

I aimed to get all they were worth and I think I did.

Q. You were paid in full and settled for that bunch?

A. Yes, sir.

Q. So independent of the ownership of the cattle whatever the contract price was you were paid in full?

A. Outside of that blackjack steer.

Q. Because you let that go to square that debt of Mitchell's?

A. Yes.

Q. Taking that into consideration the settlement was made in full and on the square for all the four different bunches?

A. Yes sir.

Q. They didn't owe you a cent?

A. No.

I don't think that Charles Peterson had anything to do with the roundup of any of these cattle or cutting any of them out. He wasn't out to the herd.

Q. Wasn't on the roundup at all?

A. No sir.

He had nothing whatever to do with it, if he had been there. I would have recalled it. The roundup in Burd's field was during the end of the roundup, along in October. These roundups occur in that country about twice a year. The purpose of the roundup is to get the stock all together and round it up and sorted out, so that the owners can get their own cattle. I can't state the names of all the people that were there on the roundup, but there was Levi Burd, Wililam Haggerty, Mitchell Peterson and Bryan Connelly. With reference to the branding, I testified to some of these cattle. As a stockman I am familiar with the method pursued when a person buys cattle of another with a different brand from his own. The purchaser vents the old brand on such occasions, and

then he put on his own brand.

Q. Was there any difference in the handling of this stock that was stolen and which you sold to the Petersons, and that which you honestly bought and paid for and sold to the Petersons, as to the venting and branding of the cattle?

A. No sir.

The old brand on the cattle was not blotched or tried to be disfigured in any way. The new was put on where anybody could see it. The old brand was apparently plain to be seen, it was just the same after the rebranding as before. Those cattle which were crooked were picked up anyways from 25 to 50 miles from the Petersons, over on the south side of the reservation. It was all the way from 20 to 50 miles off beyond the roundup of the Petersons entirely.

As to the fourth and last bunch of cattle which I sold to the Petersons, that was a lot of cattle rounded up and thrown into Levi Burd's field. That field is right east of the Petersons, I don't suppose over two miles distant.

Q. Who were the persons assisting in putting the cattle in the Levi Burd field?

A. I don't know. Levi was one of them.

Levi Burd was the owner of this field. There was some other one up there with me.

Q. How many all together assisted in getting the cattle into this field.

A. I don't know. I think Billy Haggerty.

Q. Whose cattle were they that were put into

that field?

A. A little of everybody's.

Q. That was nothing unusual?

A. No sir.

Q. What was the purpose of that?

A. Well, the cattle that belonged there we put them in there so that the people that owned them could come and get them.

I guess there were all of a hundred head of cattle put into the Levi Burd field. There might have been more. They were put into that field in the day time. I was working for the Petersons at the time, and had been working for them nearly six weeks. I continued working for them three or four days after that. I couldn't say the time of day these cattle were put into this field, I wasn't there to help put them in. I was on the roundup. I simply knew that they were put in there by what was generally understood there. All these different persons assisted in putting them in, being put in, as I have said, so that the owners could come and get their cattle.

Q. Whenever they were put in there, you did come down there to the Levi Burd sometime after?

A. Yes, after the roundup.

Q. What did you go down there for?

A. I went down for cattle at the Petersons had in there, Mitchell, Walter and Melvin and myself and a fellow named Albert Paul.

Q. He had cattle there?

A. No.



Q. He was working for the defendants?

A. Yes sir.

My object in going down there was to cut out the Peterson cattle.

Q. That was perfectly straight, wasn't it?

A. Yes sir.

There was Billy Haggerty, myself, Mitchell, Melvin and Walter Peterson and Albert Paul in the Burd field cutting out these cattle the next day.

Q. Is that all you think of?

A. Levi Burd had a man or two there.

I say that we were working that field over half an hour or about that.

Q. Had the different owners got out their cattle and taken them away?

A. Yes sir.

Q. You and Mitchell and Walter, if he was there, and Melvin if he was there, cut out the Peterson cattle?

A. Yes sir.

We took them to the Peterson field, Charles Peterson wasn't there at all and had nothing to do with it. We cut out fifteen or twenty head of the Peterson cattle.

Q. Was that all straight in cutting them out?

A. Yes.

Mitchell Peterson didn't help us in cutting out the Peterson cattle there. He went up after this R steer.

Q. I am speaking of the very time they were cut out.

A. He was there but didn't do any cutting.

Q. By cutting out you mean separating them?

A. Yes sir.

Q. There was nothing crooked about this business in the Burd field?

A. No sir.

Q. It was after that then, after the cutting out in the Burd field that you did have some transactions with reference to certain head?

A. That was this here T anchor P steer.

Q. I want to locate it. How long after the cutting out where everything was allright in the Burd field was it before you had any transaction, if any, with Mitchell Peterson?

A. As we were taking these cattle up to the Peterson field.

Q. Everything was was all straight before that time?

A. You asked me how long after it was. Just about half an hour after.

This occured as we were taking them up to Mr. Peterson's field and out of the Levi Burd field. No one was present when Mitchell and I joshed about that T anchor P steer.

Q. Was anybody present who could hear you talk?

A. Well, Melvin and Mitchell and Walter and Albert Paul and myself were there.

Melvin helped drive these cattle and I am sure that Mitchell and Walter were there. It might have been 15 or 20 head that we were taking over to the

Petersons'.

Q. Up to that time, Mr. Bostwick, if I understand you, everything was on the square between you and the Petersons as to the stock business?

A. Yes sir.

Q. Previous to that time you had not indicated anything to them or to Mitchell or anybody else that you had stolen stock or was going to?

A. No, not that I remember of.

I read my testimony at the first trial for the purpose of refreshing my recollection. Up to the last bunch of six head or seven, whichever it was, I never told Walter Peterson nor Charles Peterson that any of them were not right.

Q. The only person you ever did tell was Mitchell Peterson?

A. Yes.

It is a fact that out of the last bunch there were only one head that I told him wasn't straight, that one being the T anchor P steer.

Q. That was the only one that you wised him up to?

A. The only one that I can remember of.

Q. Will you just tell us once more about the T anchor P steer?

A. I was down there in the Burd field. It was in the Burd field when we went down there and I was working the herd and I saw this steer and it had a very dim brand on him and I sized him up couldn't make him out and called Melvin and asked him to make that out and he looked at it and

couldn't make it out either so we started on up with the herd and Mitchell and Levi Burd went over after this R steer. Mitchell caught up with us after we got two or three hundred yards from the herd with this R steer and this T anchor P steer was dragging behind and somebody in the bunch made the remark, "Who owne that steer", and I says, "I do", and when I said that Mitchell said "what do you want for him and I said fifteen dollars and he said, "What has the steer got on him," and I says, "I don't know". He said, we will wait till we get to the field and throw him and see." When we got there the rest of the boys went into the house and I and Mitchell took a rope and went and roped him an examined him and saw he was a T anchor P.

Q. What was said?

A. He said we had better leave him alone. I think it was the next day I came down there and just Mitchell was home then and this Albert Paul. I don't know where the other boys were. We cut the herd out and branded them and this T anchor P steer was standing on the side and we kind of sized him up again and I don't just remember what was said about taking a chance on him and I said "Yes if you want to take a chance it is a go with me and we will take a chance on the eighteen dollars that went in the blackjack game. We took a chance on him and that was the way the T anchor P steer came up.

Q. Could you explain to the court and jury

why it was necessary for Mitchell to pay you anything on that steer? He could have stolen him without your assistance?

A. Well he might have and he might have thought this was clearing him by buying it from me. I think he knew I didn't own the steer.

Q. If he wanted the steer, can you explain why it was when you threw him and found a brand on him you turned out and let him go,—and that Mitchell didn't want him because of that brand?

A. Only he might have thought he was getting it cheap at eighteen dollars, this being a gambling proposition.

That is the way it came up. I don't know that I have had any trouble with Mitchell. When this case was tried before I was in the Lewis and Clark County jail. Just before the case came up my attorney withdrew my plea of not guilty to both indictments and pleaded guilty for me. I had been there seven months in jail when the trial came up. I didn't know that I was going to withdraw my plea until twenty minutes before I did.

Q. You weren't told that your time was going on on your sentence while you were staying there in jail?

A. Well it didn't look like it, I put in about seventeen months and a half there.

I had talked with the people there in the jail about the trial. I never told them that my time was going on. I can tell you how that came up if you want me to explain it. I never told people there



that I was going to get even with Mitchell Peterson nor the inmates that I was going to Leavenworth and would take Mitchell with me. I didn't state that I had it in for him, or that he had rubbed it into me. I said I heard he was going to. I believe I did testify at the former trial that I would not cinch any man if I thought he was innocent. I am not trying to cinch Mr. Peterson, notwithstanding he has rubbed it into me.

Q. Then Mitchell, in your opinion, before that first trial, had rubbed it into you.

A. I say that up in Browning he testified against me.

Mr. Charles Peterson had known me at the time I was arrested for stealing that stock, ever since I was twelve years old and was well acquainted with me.

Q. And the boys the same way?

A. Yes.

Q. And you were brought up in the neighborhood with them?

A. Well yes, practically.

We boys together, back and forth a great deal. The old man was kind to me and knew me well and treated me well,

Redirect Examination.

(By MR. FREEMAN.)

Before I sold this last bunch of steers, or went through this form of selling them, I had settled up with the Petersons including Mitchell and Charles, for the two steers of Bryan Connelly and Joe Co-

bell. I simply took their word for it that the Bryan Connelly and Joe Cobell steers were among the bunch I sold them. I saw the steers, I saw those steers, but I don't know whether I sold them or not. Mitchell said that I sold them and I took it for granted that I did. I saw the two steers, the Bryan Connelly and the Cobell steer, with the Peterson brand on them. I had deducted the \$60 for them.

Q. The amount that was due. After that you sold to them this other six or seven head of steers on the 21st of October, a few weeks after that?

A. Yes sir.

Q. You took the first two bunches through Browning?

A. No sir. On the 4th of July was there at Browning.

I got these about fifteen miles southwest of Browning. There were many other cattle buyers on the reservation who were in the market for cattle. I didn't attempt to sell any of these cattle to anyone else. Some of these cattle I drove as many as fifty miles. I don't suppose there were a great many markets nearer to where I picked up these cattle than where the Petersons live. All the buyers live elsewhere. All the storekeepers buy cattle, but you can't get anything out of the storekeepers in the way of cash, all you can get out of them is in trade. There are several more buyers there of cattle on the reservation besides the Petersons. At the time I sold this last bunch of six

head, I got a \$65 check and the rest in money. I think every other time when I received money I got it by checks. Those are the checks that you have shown me here up on the stand, which I received for these cattle. He handed me this \$65 check.

Q. Was the balance between that and \$215 handed to you?

A. There was a \$65 check handed to me by Mr. Peterson and the rest in money, \$150 in currency.

This was in payment of the last bunch of cattle and also in payment of my wages, amounting to \$60. That transaction related simply to this 6 or 7 head of cattle and my wages of \$60 on the roundup.

On each occasion Mr. Charles Peterson handed me a check for the cattle. The 15 or 20 head of cattle that we took out of the Burd field on the last part of October, included the whole bunch.

Q. Were there in that bunch, taken out of the Burd field, the six or seven head that had been stolen?

A. No, I don't think they were all in there. The MW cow wasn't in there. I don't know if the OO cow was there or not.

Q. Where were they?

A. We had throwed them in the field there.

When we came to brand them the next day, we put in the MW cow. The Petersons ranch is about quarter of a mile from the road there. It is usual for cattle buyers to go into Browning to buy cattle.

Recross Examination.

(By MR. CARLETON.)

The cattle which I sold to the Petersons were not beef cattle. I wouldn't expect to take such stock as that to a store or to market and sell it for beef. Four of the five head of the last bunch I sold to the Petersons were got out of the Burd field. The T anchor P steer was one of this number. That is the only one that I can just now remember that we got out of the Burd field, which was in the last bunch of six or seven head sold to the Petersons.

Redirect Examination.

(By MR. FREEMAN.)

Q. When you say this is the only one you can recall how about the 25 steer?

A. Yes he was in there.

The 17 on the left ribs and the TS on the left thigh I think were there. It seems to me the OO on the left hip cow was cut in the field there. She got into the Peterson field because we throwed her into this field, sometime before. This roundup had passed the Peterson ranch sometime before and that time we throwed some cattle into the Peterson field.

Qi How did you come to take up this OO animal of Henry No Bear?

A. It was on the roundup, and any time I saw anything like that I thought was safe to pick up, I took it.

Q Who helped you throw these cattle in the

Peterson field?

A. I think Mitchell helped me part of the way and they had some young fellow there working at the time and he helped take them down the rest of the way.

I think that in this bunch of Peterson cattle, which we got out from the Burd field, there was a steer branded 25, a cow branded 17, and a cow branded TS and the T anchor P steer, and the R steer.

Recross Examination.

(By MR. CARLETON.)

Q. These animals you had picked up the same as the others?

A. Yes out of that Burd field, taken for the roundup.

I am not positive that I saw them OO animal driven into the Peterson field, This animal might have been in the Burd field, I can't recollect. I remember that I testified at the first trial that the OO cow was thrown into the Burd field with the rest, and that testimony is correct. I had no conversation with Mitchell about the 25 and the 17, when we took them out of the Burd field.

BY THE COURT: You say you threw some of these into the Peterson field? Where did you put the cattle first?

In the Burd field. We took them back to the Peterson field. No that was another bunch already in there taken out of the Burd field after the roundup went by. We took these 6 or 7 head from



the Burd field up to the Peterson field at the finish of the roundup. The cattle were first put in the Burd field and they were brought to the Peterson field after the roundup. As we passed the Peterson ranch with the roundup a couple of weeks before we quit, some cattle were thrown into the Peterson field as we passed, but none of the 6 or 7 head that I have just been speaking about. I don't know if the Bar Double O was left in the Peterson field or the Burd field. There were some cattle had been put in the Peterson field. Mitchell and some other fellow helped me part way. Mitchell helped me put them in, because we were moving the old bunch and they were put in together. This was a bunch cut out from the roundup and were put in in order to keep from taking the herd with the wagon. Michell told me the Connolly steers were two I had sold him on the 4th of July, and he said they turned out to be Connolly's and Cobelle's steers. He didn't ask me how I got them. I said: "If they are two of them steers, let me have them back and I will let the owners have them, and I will pay you \$60.00 back for the two steers." It was taken from the \$90.00 that they owed me. I made the settlement with Mitchell, but Mr. Peterson paid me, and no more was said about it so I suppose he told his father. He gave me \$215.00. He owed me \$150.00 and he took \$60.00 off from the \$150.00 so it left me \$90.00; and then I drew five dollars and \$10.00 and \$20.00 at a time of this \$90.00 until I guess I spent it all by the time the

roundup was finished. I don't think Charles Peterson said anything to me about this allowance of \$60.00.

Redirect Examination.

(By MR. FREEMAN.)

Q. Who kept the account between you and Peterson?

A. I had a little memorandum book and when he would pay me I would put it down the different amounts.

I put down the times I received any money from him.

CHARLES BUCK, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Charles Buck and I live on the Blackfeet reservation and am engaged in cattle business there. In the fall of 1910 I was running the wagon on the roundup. I am acquainted with Bryan Connelly, and Mitchell Peterson. I was present on the roundup at the time when the difficulty came up with reference to a steer that Bryan Connelly claimed to own that had a Y—K on it. At that time the steer was in the herd back of Levi Burd's and this steer matter came up and Bryan claimed the steer and Mitchell said it was his. They roped the steer and examined the brand and found Connelly's brand on the steer and the steer was turned loose and Bryan took it. Bryan was very much worked up about the steer having Peterson's brand

on it. He wanted to know how it came about and Peterson told him he got the steer from John Bostwick and they kept on talking, and I overheard Mitchell say to him; "Why Bryan you know I wouldn't steal a steer from you." There was a Joe Cobell steer in that herd also with a Peterson brand on. Bryan Connelly was looking for the Joe Cobell steer. Nothing was said in my presence by Connolly to Peterson about Cobell steer. I have heard the steer mentioned but didn't pay any attention to it. Mitchell Peterson was there, working with the wagon, and Bostwick was also working with the wagon, working for Peterson. This took place about three weeks before the roundup closed. I was away when they were finishing up the roundup.

Cross Examination.

(By MR. CARLETON.

Mitchell told me that at the time Connelly came up there he had bought the animal of John Bostwick.

Q. And Mr. Connelly didn't deny that did he?

A. I don't know, I guess he can't deny it if he said it to him.

I heard Mitchell say he would not steal any animals from Bryan. The original brand on that Joe Cobell steer was an NC. I didn't pay much attention to it. I didn't see any Bryan Connelly cow there at that time.

## Redirect Examination.

(By MR. FREEMAN.)

I never paid any attention to the steer. I know it was a Joe Cobell. The NC is Cobell's brand. I didn't see this particular brand, I never paid any particular attention to this steer.

Q. Did you see the steer?

A. No sir.

BY MR. FREEMAN: You admit that all these people are wards of the government:

BY MR. CARLETON: Oh yes.

BY MR. FREEMAN: On the Blackfeet Indian reservation in the state and district of Montana?

BY MR. CARLETON: Yes.

BY MR. FREEMAN: Then the names of the persons who appear in the indictment, various names, are the owners of the cattle described therein?

BY MR. CARLETON: Well, I made my admission at the opening of the trial, the court remembers, all with certain exceptions, Mr. Freeman.

BY THE COURT: I doubt that your admission at the time it was made covered ownership.

BY MR. CARLETON: We will now admit, and thought I had, the ownership, except as to those mentioned in count 4. As to those we shall require proof.

BY MR. FREEMAN: With exception to the steer, the Bryan Connelly steer?

BY THE COURT: You admit it, all except the steers, having the steer branded PY?

BY MR. FREEMAN: That you may understand it, as well as ourselves, at the time of the drawing of the indictment we alleged one a steer and one a cow and a cow and steer, because we didn't know from the testimony we had at hand, we couldn't tell what it was, don't you see, so that really, as far as we are concerned in the matter, we simply had in mind that there was one animal belonging to Connelly and one to Cobelle, but whether it was a steer or cow we didn't know, and so we alleged it both ways, both a steer and cow, and the NC of course we alleged that as being the brand.

BY MR. CARLETON: The admission can apply to the first animal described in count 4, but not the last three; as to the ownership of these the defendants insist on proof of the animals described in the indictment.

BY MR. FREEMAN: With the exception of two short witnesses, that ends our case. The train seems to be eight or nine hours late, and the train is not in.

BY THE COURT: Five minutes to five; suspend at this time.

(Whereupon the court adjourned until March 28th, 1913, at 10 o'clock A. M.)

BY MR. FREEMAN: I will now read into the record a portion of the testimony given by the defendant, Charles Peterson, at the former trial. Under stipulation on file the record of the testimony as given at the former trial is deemed to be true and correct. I read from page 384 of the



testimony of Mr. Charles Peterson given on the former trial as follows:

Q. Just a moment before we pass the first bunch. Had you anything to do with the purchase of that bunch?

A. No sir.

Q. Had you any interest in it?

A. Why, not much either, that RK brand belongs to myself and my wife and the Y—K cattle.

Q. I understand Mitchell paid for the four steers with his check?

A. With my check.

Q. Excuse me, I was wrong about that. So they became your property after the purchase and your wife's?

A. Yes sir.

JOE BROWN, recalled as a witness on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

Q. Mr. Brown I will ask you whether or not in this bunch of cattle testified to as being driven from the Peterson field to the government field and there examined whether or not there was a steer in that bunch belonging to Dick Kipp?

BY MR. CARLETON: Objected to as irrelevant and incompetent and immaterial.

Objection overruled and defendants except to the ruling.

A. Yes sir.

On the steer as I have it the brand is an AK;

there was also the Y—K brand on the left ribs. That was ID stuff also.

Cross Examination.

(By MR. CARLETON.)

I have lived on the reservation twenty one years and have been superintendent of live stock about three years.

Before the inauguration of the permit system the Indians bought and sold stock among themselves without a permit. The permit system was inaugurated under Major Monteith's administration. I judge this was about ten or eleven years ago. The regulation relative to permits is not violated to my knowledge.

BY THE COURT: When an Indian sells this ID stock he must get a permit to sell to another Indian?

A. Yes sir.

Government Rests.

Both Rest.

BY MR. CARLETON: May it please the court, the defendants in this case,—my associate and myself are content to rest their case upon the record as it is made up under the testimony of the Government and we shall take no further time of this court and the jury in the introduction of any testimony. We do desire to place in the record the following: Come now the defendants Charles Peterson, Mitchell Peterson and Walter Peterson, the government having rested its case and announced that it has no further testimony to offer, and move

the court to dismiss the prosecution against them and each of them or to direct the jury to return a verdict of not guilty upon the ground and for the reason that there is no evidence in this case that would support or justify a conviction. The testimony of the government having made out the case of the defendants as made in the opening statement of counsel, we submit the motion to the ruling of the court.

COURT: Well without any comment the court will deny it.

MR. CARLETON: Save an exception.

MR. CARLETON: Come also at this time the defendant Charles Peterson, the government having rested its case and announced that it has no further testimony to offer and moves the court to dismiss the prosecution as to him or to direct the jury to return a verdict of not guilty upon the ground and for the reason that there is no evidence in this case that would support a conviction, on the contrary the testimony of the government itself clearly shows that the defendant, Charles Peterson, was in no way shape or form guilty of the offense in that there is no evidence whatever to show that he had any guilty knowledge at the time of the alleged commission of the offense. We submit that to the ruling of the court.

COURT: Motion denied.

MR. CARLETON: Save an exception.

We also make the same motion as to Walter Peterson for the same reasons.

COURT: The motion is denied.

MR. CARLETON: Come also the defendants and move the court to dismiss the following portions of said count four to-wit: One cow branded NC on the left shoulder the property of Joe Cobell an Indian person.

MR. FREEMAN: I think the testimony of Mr. Buck was it was a steer.

BY THE COURT: Motion denied. The jury will be instructed to disregard the cow. (Exception.)

MR. CARLETON: We make the same motion as to one steer branded NC on the left shoulder the property of Joe Cobell an Indian person. Neither of the NC animals are identified by a single witness. The brand has not been identified and not a scintilla of evidence to support this.

MR. FREEMAN: This is one of the animals which the defendants,—the Bryan Connelly and the Joe Cobell were rounded up as you remember and sixty dollars was allowed back on the hundred and fifty. Mr. Buck testified that Mr. Connelly's or that of Joe Cobell's brand was the NC.

COURT: You admit there was one animal that was stolen?

MR. CARLETON: As to there being a cow there wasn't any cow at all. The District Attorney tried to explain that to the court. As to this animal we expressly stated that we would challenge the prosecution to its proof upon this.

COURT: I will overrule that now and consider it when it comes to the instructions.

(Exception noted.)

MR. CARLETON: There is no evidence to warrant the conclusion that that animal was stolen in the first place even if it had the brands of the defendants or some of them on it. There is no evidence here that this brand was on the property, Bostwick said he bought and paid for.

MR. CARLETON: To the ruling of the court we save an exception. Come also all of the defendants at this time the government having rested its case and announced that they have no further testimony to offer and move the court to dismiss or to instruct the jury to return a verdict of not guilty as to the following portions of said indictment and to withdraw it from the consideration of the jury all that portion found on page 2 at the end of count three reading as follows: "Six other head of cattle, the property of various Indian persons whose true names are to the Grand Jury aforesaid unknown, upon the ground and for the reason that in the first place the allegation itself is too indefinite and vague and uncertain to admit of any proof and on the second ground that there isn't a bit of proof that supports the charge or at least any that would be sufficient to sustain a conviction.

MR. FREEMAN: If the court please there was evidence to support that count. That relates to the driving of the cattle there on the 29th day of July, 1910, when he testified he drove seven or eight head. We were unable to get a description of the Mrs. John Whiteman animal and the Mary



Teasdale.

COURT: For the present the motion is denied.

MR. CARLETON: Exception.

Come also the defendants at this time, the government having rested its case and announced that it has no further testimony to offer and moves the court to dismiss the indictment as to the following animals described in count four thereof, to-wit: One cow branded PY on the left hip, the property of Bryan Connelly, an Indian person for the reason there isn't a scintilla of evidence in this record to support the allegation in the indictment. I submit it to the ruling of the court.

COURT: The jury is instructed to disregard that.

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The foregoing comprises in substance all the evidence introduced upon the trial of said case including exhibits.

Whereupon counsel for the respective parties argued said cause to the jury.

Be it further remembered that upon the trial of said cause the government introduced and there were received in evidence the following exhibits:

Gov. Ex. A.

No. 1711; U. S. vs. Peterson, et al  
U. S. District Court, Montana  
U. S. Exhibit A.

Filed June 20, 1911.

GEO. W. SPROULE, Clerk.

By.....Deputy.

Browning, Montana, November 10, 1910.

We, Mitchell Peterson, Oscar Peterson and Walter Peterson, do solemnly swear that the following named cattle were purchased by us from John Bostwick at different times since July 1, 1910, and that the list named herein are all the cattle purchased by us from the said John Bostwick:

1 steer branded DT on the left shoulder JT.

1 cow branded  $\overline{21}$  on the left shoulder.

1 cow branded  $\mathcal{Z}$  on the right shoulder.

1 steer branded 2—3 on the right hip.

1 cow branded 17 on the left ribs.

1 cow branded O on the left hip.

1 steer branded Y° on the left hip.

1 cow branded R on right shoulder.

1 cow branded  $\overline{OO}$  on the left hip.

1 cow branded  $\overline{12}$  on the left shoulder.

1 cow branded 30 on right hip.

1 steer branded  $\mathcal{F}$  on right shoulder.

1 cow branded  $\mathcal{R}$  on the left hip.

1 steer branded  $\mathcal{P}$  on the right hip.

1 steer branded  $\mathcal{L}Y$  on the right hip.

1 cow branded  $\mathcal{S}$  on the left hip.

1 steer branded 25 on the left ribs.

1 cow branded MW on left hip.

1 steer branded TP on left ribs.

OSCAR PETERSON,  
MITCHELL PETERSON,  
WALTER PETERSON.

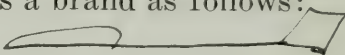
Subscribed and sworn to before me this the  
10th day November, 1910.

ARTHUR E. McFATRIDGE,  
Supt. & Spl. Disb. Agent.

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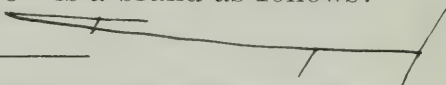
Government's Exhibit "B" is a brand as follows:

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Government's Exhibit "C" is a brand as follows:

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Government's Exhibit "D" is a check drawn by  
Charles Peterson on The Security State Bank of  
Havre, dated July 4th, 1910 and payable to John  
Bostwick, and shows payment on July 11, 1910,  
by the said The Security State Bank of Havre, and  
is in the sum of \$130.00.

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Government's Exhibit "E" is a check drawn  
by Charles Peterson on the Security State Bank  
of Havre, dated August 1, 1910 and payable to  
John Bostwick, and shows payment on August  
8, 1910, by the said The Security State Bank of  
Havre, and is in the sum of \$110.00

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Government's Exhibit "F" is a check drawn  
by Charles Peterson on the Security State Bank  
of Havre, dated August 1, 1910 and payable to

John Bostwick, and shows payment on August 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$100.00.

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Government's Exhibit "G" is a check drawn by Charles Peterson on the Security State Bank of Havre,, dated August 30, 1910, and payable to John Bostwick, and shows payment on September 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$175.00.

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Government's Exhibit "H" is a check drawn by Charles Peterson on The Security State Bank of Havre, dated August 30, 1910, and payable to John Bostwick, and shows payment on September 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$175.00.

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And the defendants introduced as a part of the cross examination of Government's witnesses Exhibits A, E, F, G and I and J.

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Defendants' exhibit "A" is a brand, as follows:

*BB*

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Defendants' Exhibit "E":

Willits & Scriver,

U. S. Indian Traders,

General Merchandise.

Browning, Montana, Nov. 13, 1909.

To all whom it may concern.

This is to certify That I sold to M. F. Peterson  
3 heads of cattles Bearing my Brand S U N Rt Rib,  
2 R. Rt shoulder.

For further information apply to

EDDIE BEAR CHIEF.

(Endorsed:) Bill of sale. Eddie Bear Chief.

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Defendants' Exhibit "F":

Nov. 1909.

To all whom it may concern.

This is to certify M. F. Peterson 3 heads of cat-  
tles bearing my brands S U N rt Rib 2 R. rt shoul-  
der.

For further information apply to

EDDIE BEAR CHIEF.

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Defendants' Exhibit "G":

Eddie Bear Chief.

Eddie Bear Chief.

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Defendants' Exhibit "I" is a check drawn by  
Mitchell Peterson on The Security State Bank of  
Havre, dated.....1910, and payable to  
John Bostwick, and shows payment on Nov. 1,  
1910, by the said The Security State Bank of Havre,  
and is in the sum of \$65.00.

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Defendants' Exhibit "J" is a check drawn by  
Charles Peterson on The Security State Bank of  
Havre, dated Oct. 5, 1910, and payable to John  
Bostwick, and shows payment Oct. 10, 1910, by the



said The Security State Bank of Havre, and is in the sum of \$25.00.

Thereupon defendants requested the following instructions:

*In the District Court of the United States, District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON, WALTER  
PETERSON and CHARLES PETERSON,

Defendants.

No. 1712.

Defendants' Request for Instructions.

Defendants request the following instructions to be given to the jury in this case.

W. F. O'LEARY and

E. A. CARLETON,

Attorney for Defendants.

I.

The Court instructs the jury that before you can convict any one of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants re-

ceived or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of any one of them you must give the defendants the benefit of such doubt, and acquit.

## II.

You are instructed that as to the question of whether or not the defendants, or any one of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time that they did receive any stolen cattle, if such is the fact that they did receive stolen cattle, then it is your sworn duty to acquit.

## III.

You are instructed that the statute, under which these defendants are prosecuted, makes knowledge upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even though you should find that all or any part of the property in question was stolen and that

all or any part of it was received by the defendants or any one of them, still neither of those facts is sufficient for a conviction in this case. In the affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants, or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secretly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand whether or not the cattle were branded in broad daylight and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consideration whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied

receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and circumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit.

#### IV.

You are instructed that under the admission of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle actually knew that the same had been stolen or any of them. In order for a conviction of anyone of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that

the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.

#### V.

The court instructs the jury, that the defendants are to be tried only on the evidence which is before you, and not on any suspicion, if any, that may have been aroused by questions or arguments of counsel. Suspicion, however strong, is not sufficient to convict anyone of an offense.

#### VI.

You are instructed in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants' innocence, it is your duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit.

#### VII.

The Jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless that



you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony.

### VIII.

The Court instructs the jury that the defendants are on trial only upon the charge alleged in the indictment, viz., that of buying and receiving stolen property knowing it to have been stolen. And whatever evidence has been admitted which may tend in any degree to show the larceny of other property is admitted solely for the purpose of showing whether or not the defendants had knowledge that the property in question was stolen at the time they received and purchased it.

### IX.

If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it knowing it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants.

### X.

The Jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and

Walter Peterson and Mitchell Peterson you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is a single fact proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with said defendants guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.

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The Court modified the Third Paragraph of requested instruction No. 1, by inserting after the word "knowledge" in line three of said paragraph the following: "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

The Court modified requested instruction No. 4 by inserting after the word "knew" in the fourth line of said requested instruction, the following: "believed or reasonably suspected as aforesaid," and by also inserting after the same word "knew" in line seven of said instruction the following: "believed or reasonably suspicioned as aforesaid."

Likewise, also, the Court modified requested instruction No. 9 by adding thereto after the word "knowledge" in line three of said instruction, the following: "or belief or reasonable suspicion which they failed to investigate for fear of discovering

the truth", and also by adding after the word "knowing" in next to the last line of said requested instruction No. 9 the following: "or believed or reasonably suspicioned as aforesaid."

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Thereupon the Court gave its instructions to said jury, and which said instructions are in the words and figures as follows, to-wit:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you with reference to the law of the case. In all cases the jury are the exclusive judges of the facts. It is for you to say how much credibility you will give to any witness and what part of his testimony, if any of it, you will believe, and what weight you will give to any part of the evidence or any witness' testimony; and it is your duty also to take the law from the Court.

The law in this case is a statute of the United States, which says that whoever shall buy, receive or conceal any money, goods or other thing which may be the subject of larcency, which has been feloniously taken, stolen or embezzled from any other person, receive it knowing the same to have been so taken, stolen or embezzled, shall be fined not more than a thousand dollars and imprisoned not more than three years. This is a felony.

The property involved in this case is of things of value. The indictment is in four counts. The first count is for receiving, knowing the same to

have been stolen, four head of cattle. The defendants Charles Peterson and Mitchell Peterson admit that these four head in the first count were stolen and that they received and branded them; they deny, of course, that they had any knowledge that they were stolen, and that is a matter for you to pass upon with reference to that count.

The second count charges these defendants with having bought and received six head of stock, stock which the indictment alleges to have been stolen, and that charge is that the defendants received that with the knowledge that it had been stolen. The defendants Charles Peterson and Mitchell Peterson admit that this stock was also stolen and that they received and branded it, but they deny that they had knowledge that it was stolen, and that is for you to determine in respect to that count.

The third count charges the defendants with having bought and received, feloniously, two head of stock, also six other head of cattle, with knowledge that it was stolen. The defendants Charles Peterson and Mitchell Peterson admit—the admission did go to all of it, the six and two—but with reference to the six which are undescribed in the indictment the Court will say to you that you may disregard it, as there is no identification sufficient to find a verdict under that part of the charge. The third count however, describes two head of stock, and Mitchell and Charles Peterson admit that those two head were stolen and that they received and branded them, but they deny that they



had any knowledge that they were stolen, which is for you to determine the truth of.

The fourth count charges the defendants with having bought and received feloniously four head of described stock and two head undescribed. Of these four head the defendants Charles Peterson and Mitchell Peterson admit that they received the first one described, a steer branded PY on the left hip, the property of Bryan Connolly, an Indian person; they admit that they received that, that it was a stolen steer, and they branded it, but they deny that they had any knowledge that it was stolen. They deny everything in respect to the balance of the animals in the fourth count.

In respect to Walter Peterson, the plea is simply not guilty, he admits nothing in respect to any of the stock. Or was the admission that it was received?

BY MR. CARLETON: Not by him, your honor.

BY THE COURT: I understand the admission is, with respect to all parties it was stolen stock and received by Charles and Mitchell and branded.

BY MR. CARLETON: If that wasn't so it may be made so. But so far as Walter is concerned there is no admission by him that he received any of it or that he branded any of it.

BY THE COURT: In respect to this indictment, first, the Court will withdraw all the animals described in the fourth count, except the first one that Charles and Mitchell admitted was stolen and



received and branded by them, for the reason they are in a measure duplicates; for instance, the first animal they admit having received and branded was also charged to be a cow, the District Attorney apparently not being sure of the sex of the animal; and with reference to the Cobelle steer there is no sufficient proof that this particular animal charged in the indictment—there was testimony of a Cobelle steer, but not that it was a steer branded NC as charged in the indictment; so the court will say to you that the only animal upon which you are to pass upon the guilt or innocence of the defendants in the fourth count is the first one described therein. There is some other evidence, upon review of it at the noon hour, the Court has concluded to withdraw from you, and that is all evidence that the cow branded JT of Joe Tatsy, the steer P Diamond of Old Rock, the cow HM of Henry Marceau, the steer ER of Eagle, the cow MF of Frank Monroe, the steer E2 of Young Running Crane, the cow DC of Double Cloth; the testimony in reference to these is all withdrawn from your consideration, and you will disregard it, and for this reason; it was proper enough as it was introduced, because the expectation was that the evidence would go further and show that it came into the hands of these defendants from someone who had stolen it. The evidence was conclusive enough that the property was stolen, but there was no evidence how it got into these defendants hands. Now if these defendants were on trial for stealing stock, the evidence

that they had in their possession other stolen stock might be permitted to raise an inference that they had stolen it; but they are not here charged with stealing stock, but with receiving stolen property, and before the evidence of other stolen stock in their possession can be received and considered by you, from which to draw inference of their knowledge, there must be some proof that it was stolen by someone else other than the defendants; but there is no evidence of that kind here. But, of the steer T Anchor P of Dave Pambrum and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment—these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment. Now, there is an admission by Charles and Mitchell that it was stolen and branded by them, and I think the proof is sufficient in every respect that the property described

in the indictment as to all these defendants was stolen property and passed over to some of the defendants—Charles and Mitchell at least, by their admission and it is for you to say whether Walter had any hand in that.

In this case you can find the defendants or any one of them guilty under any one of these four counts or all of them, or you can acquit any one or more of them of any one or more of these counts or charges, or you can acquit them of all of them, as the evidence justifies you in doing in your judgment.

In this case the defendants and each of them stand before you presumed to be innocent, and that presumption remains with them and you give them the benefit of that until upon all the evidence you are satisfied, if you ever are, that they are guilty as charged in this indictment beyond a reasonable doubt.

A reasonable doubt does not mean all doubt or any doubt or a suspicion that they might be innocent or a possibility that they might be innocent, but means just what it says, that you, as reasonable men, after a review of all the evidence, taken in connection with the law, feel that you have not an abiding conviction to a moral certainty of the guilt of the defendants. As reasonable men you say to yourself that there is something in this evidence or something lacking in the evidence because of which I am reasonably doubtful whether they are guilty or any of them. If you are in that state

of mind, of course it is your duty to acquit. You are not called upon to determine whether the defendants or any of them are innocent, but if they, or any of them, are not proven guilty to your satisfaction beyond a reasonable doubt, it is your duty, and you are bound under your oath, to acquit them, or any of them.

As indicated to you, the defendants are not called upon to prove their innocence. Now that brings, makes it timely, to refer to the fact that the defendants, and neither of them, took the witness stand. It is commented upon by their own counsel, and hence that opened the door for the prosecution likewise to comment upon it, but the law is that a defendant may take the witness stand at his own request to testify in his own behalf, if he desires, but if he does not request the privilege of taking the witness stand you are not to draw any presumption of guilt from that. It is his right to stand silent and compel the government to prove him guilty beyond a reasonable doubt, if it can. In other words, no matter how guilty he is, he is not bound to go on the witness stand and show you he is innocent; he can stand still and simply see whether or not the government can and will prove him guilty beyond a reasonable doubt. If it does not you are bound to acquit him. You must understand the court is not asking you to infer he believes, or intends to say, these defendants are guilty; that is for you exclusively to determine. If anything the Court says might lead you to believe the



Court has an opinion with reference to the guilt or innocence of the defendants, or if the Court should express some opinion, you are not bound by that. You give it such consideration as you may think it deserves in your judgment, but remember it is not binding upon you. You have the same responsibility to decide the facts as the Court has to give you the law. In other words, the Court's duty is to give you the law correctly, and it is your duty to decide the facts correctly. The Court cannot shift its duty to you, nor can you shift your duty upon the Court because you may think the Court thinks one way or the other upon the proposition involved here.

As before stated, you are the exclusive judges of the credibility of all witnesses, of how much weight shall be given to their testimony or any piece of evidence placed herein. If you believe any witness has testified falsely in any part of his testimony, you have the right to disregard all the testimony of that witness, if you believe none of it is entitled to any consideration.

You will observe that the law involved requires that before a party can be convicted of buying or receiving stolen property he must have knowledge that the property that he is buying or receiving was stolen. Now, the fact that he has this knowledge need not be shown by direct testimony, nor is it essential that the accused have actual or positive knowledge such as one acquires by personal observation of the fact; that is to say, it is not necessary



that he who buys should see the thief taking the property, nor is it necessary that the thief should tell him he stole the property, but if the circumstances and conditions surrounding the purchase, and the nature of the property and all are such that it can be inferred by you, as reasonable men, that the defendant had knowledge, you have a right to draw that inference. You may infer such knowledge from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that the property was stolen.

If the jury believe that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable man, a man of ordinary intelligence, would have acted under like circumstances; you have a right to believe that they could and did draw the same inferences from the circumstances and the situation that any man of ordinary intelligence would draw, and of course it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know.

If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an enquiry or suspicion so suggested for fear he or they would learn the truth and find the good were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge. In other words, if property is offered to a person under circumstances that cause him to suspect it is stolen, and he makes no enquiry or no investigation because he fears he would find out the truth,—he wants the property and he thinks that because he simply has a well grounded suspicion that that protects him, and he will not make any further enquiry,—in the eyes of the law he is as though he had made the enquiry and had discovered all the facts; because a man cannot shut his eyes to what is apparent to him or what he determines and knows he can ascertain by enquiry; he is charged with what he knows or what he is put upon enquiry to know.

If the circumstances led the defendants or defendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make enquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.

A person may be built of receiving stolen property, though it is only constructive possession; if it is under their control, and even though it may be secured from another person, and though the defendant might never have seen it; a person who permits his partner knowingly to receive stolen property for the benefit of both, or if he allows one of those charged together to place it in a common field belonging to them all, in the eyes of the law it is in possession of them all. And a person can receive stolen property by a partner, agent or servant just as well as by his own hand. If one person receives stolen property knowing—I do not remember however, that there is any evidence that these defendants were in partnership; there is evidence from which you can infer that they lived together, worked together, related—father and son—but perhaps none which you can draw the inference that they were partners. The Court was about to observe if one person receives stolen property knowingly, and the other partner knows it and receives it, he would be equally guilty with the first; however, it is not shown there is any element of partnership involved here.

From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such know-

ledge as would put a reasonable man upon enquiry from which he could ascertain the truth.

So far as Charles and Mitchell Peterson are concerned, and all of the defendants as a matter of fact, you must first be satisfied the property described in the indictment, or some of it was stolen in the manner and form as charged in the indictment. Of course it is admitted, so far as Charles and Mitchell are concerned. Second, that one or more of the defendants received and retained it in his possession with the intent to convert it to his or their own use and gain. I say convert it to their own use is material, but you ascertain that from the circumstances of the case. If you find that they received stolen property knowing that it was stolen, knowing as I have heretofore defined and kept possession of it as their own and for their own uses, branded it, you would have the right to draw the inference therefrom that they had an intent to convert it to their own use and gain. Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.

Each of these propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have a reasonable doubt as to any one of them you must give the defendants the benefit of any one of them and acquit.

You are instructed that, under the admission of



the defendants, that the gist of this case is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge as heretofore defined to you, that the property had been stolen at the time it was purchased.

The Court instructs you that the defendants are to be tried only on the evidence before you, and not on any suspicion if any, that may have been aroused by questions or arguments of counsel. Suspicion, however strong, is not sufficient to convict anyone of an offense.

The Court instructs you that the defendants are on trial only upon the charges alleged in the indictment, namely, that of buying and receiving stolen property knowing it to have been stolen; and whatever evidence has been admitted which may tend in any degree to show the larceny of other property is admitted solely for the purpose of showing



whether or not the defendants had knowledge that the property in question was stolen at the time of receiving and purchasing it.

If you believe from the testimony and all the facts and circumstances in the case that the defendants, or some of them, purchased the property in good faith, without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove, beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants:

In sitting in a jury box gentlemen are not changed at all in their methods or habits of thought. Whatever would convince you as a man of the guilt of a defendant, seriously contemplating the evidence, would be sufficient to convince you as a jurymen. This is a transaction that is entitled to your serious consideration, the interests both of the prosecution and the defendants demand it. You have listened to the evidence and the circumstances surrounding this transaction. Here are these defendants apparently, upon the evidence, living on the Indian Reservation some 16 or 18 miles north of Browning, which is on the railroad, and appar-

ently living and working together. They have a number of different brands. This man Bostwick had lived for a good many years some five or six miles from them on his brother's ranch, an Indian also, with but one leg. They knew him well, he knew them well; he says that Charles Peterson had been on occasions kind to him. Now, there is some evidence that Bostwick had bought and sold cattle and had some money in a bank prior to the particular transactions here involved, but there is no evidence that the defendants had any knowledge of that, or that any of these prior sales had been made to these defendants. It seems, as far as the evidence shows, without any prearrangement of any kind whatever, that Bostwick happens along about the 4th of July in Browning with some four head of stock which he had gotten on the south side of the Reservation, as it is termed, which must be some distance south of Browning. He falls in with Mitchell Peterson there and transfers him these four head of stock and receives a check for it signed by Charles Peterson. Now, of course, the evidence is—and it is proper for you to consider—that this was in the day-time, that apparently what is termed a fair price was paid by the defendants, or which ever of them purchased them, for the property. These cattle were driven home to the ranch of the Petersons, these defendants, and my recollection of the evidence is that both Walter and Mitchell had something to do with the branding, corralling and branding, of them; if, however, Walter had not, you will

remember the testimony. At any rate, from the evidence, these cattle were a long ways from their accustomed range and were of different brands, and those are things and circumstances for you to consider. It seems that no permits were asked for; Bostwick was not asked whether he had a permit to sell; he was not asked where he purchased them, and whether he had received a bill of sale from whoever he purchased them from. There is no evidence that Bostwick was known to own any herd of cattle which would supply them, or that he had any brand, and it is for you to consider whether or not it could be reasonably supposed that the defendants assumed these four cattle were raised by Bostwick, or whether they assumed that he had purchased them or traded for them, or whether they were just to draw that presumption from the circumstances as they then presented themselves. There is no evidence that these cattle were concealed anywhere in the mountains or hidden, but I don't know whether there is any evidence they were turned loose on the open range. The defendants had fields fenced in there.  
there.

MR. CARLETON: Pardon me, I think that was only—

COURT: Well, the jury will remember if they were. Some of other of these four lots may have been, but with reference to these four the evidence, I don't remember any evidence, I don't remember any evidence that any of them were turned on the

open range, unless you infer it from the fact that on the roundup the Cobelle and Connolly steer were picked up and found by Connolly, who owned one and had dominion over the other. And those are circumstances for you to consider, whether a man in buying or receiving stolen property would allow it to run in whatever way this stock was accustomed to run.

It seems the corral where they were branded is some ways from the road. I assume the Reservation is not a thickly settled place; whether or not people are continually going around looking for stock or whether they turn their stock on the range and don't see it from one year's end to the other does not appear from the evidence. At any rate, that is the transaction.

A little later, in the same month, I think, possibly the first of August, I am not sure, Bostwick, so far as the evidence shows with no arrangement whatever with any of the defendants appears this time. I think at their ranch on the South Fork, with some six or seven head, and he sold those, the bargain being made through Mitchell apparently, and received Charles Peterson's check for them, for what is said again to be a fair price,—all that is for you to determine. However, there is no evidence contradictory of the testimony of Bostwick that it was a fair price, and the Court thinks that you must find from that evidence that under all the circumstances the price was fair. They were not beef cattle apparently. These cattle again were of mix-



ed brands, and again, so far as the evidence shows, there was no enquiry from him as to where he had received them, except possibly that he told them he had gotten them on the south side, and nothing asked of him if he had bills of sales or permits. Now it is true that personal property can be transferred without the necessity of a bill of sale passing, but it is for you to consider whether a man buying from another man happening at his place with a bunch of cattle with strange brands would buy without ascertaining where they were from and whether he had any right to sell them, and would ask whether had a bill of sale.

The permit question is a circumstances to be considered by you. It is the law that an Indian cannot sell any of this Interior Department, or I. D. cattle as it is called, without a permit, to a white man. Whether that white man is married to an Indian woman or not, it is a serious offense for a white man to buy such stock without ascertaining if the Indian had a permit to sell. But, while there is no evidence that there were any negotiations between the Indian Bostwick and Charles Peterson directly, you will determine whether it was a method by which Charles was buying without himself being drawn directly into the transaction, to escape the provision of the law that I have referred to.

There is no law that an Indian cannot sell to an Indian without a permit, but it does seem that the Agent has taken it upon himself to make a regulation to that effect, and the Court will not say that



he would have authority, binding authority, to do so; it doubtless would be a wise regulation. However, the evidence is that that regulation was generally lived up to.

The inspector tells you that he knew of no time when it was violated, and so the evidence appears to you. And then it is a circumstance for you to consider, if that was the regulation to govern these Indians and they lived up to it, why it was not lived up to in this particular instance. It is true that apparently the Indian Bostwick sold some cattle to these Indians after the same fashion which he had a right to sell, cattle that he himself had bought. Now, whether that is a sufficient excuse for the absence of a permit in the other cases, it is a matter that you are to consider and draw such conclusions from the whole that to you as reasonable men, seems justified.

A little later Bostwick appears again at the Peterson ranch some time in August, the latter part of August with a bunch of 16 or 17 head; of that bunch it was that he said he owned about a half, that he had bought them somewhere; the other half were stolen. No previous arrangement as far as seeing them. And these cattle were again sold. I think the negotiations through Mitchell though Charles Peterson's check passed again, if I remember rightly, and there was a balance left due of \$150.00 as you will remember. These again were mixed brands, without permits or any enquiry, so far as the testimony shows.

A little later Bostwick goes to work for the Petersons, the defendants, at ten dollars a week, riding on the roundup. The roundup came on. Sometime during that roundup, the evidence is, that Connolly discovered one of his steers branded with the Peterson brand Y—K; and it was one; according to what Mitchell Peterson told at that time, of the first bunch sold in July by Bostwick to some of the Petersons, and the brand on the property was that of Charles and his wife. There was some testimony read to you from the former trial wherein Charles had said, if I remember rightly, that while he had no part in the buying of the cattle, that after they were bought the Y bar K and the RK brand was placed upon them and they were the property of himself and his wife, though I think the brands are his wife's nominally in the office record, his wife's brand if I remember the evidence correctly. This Connolly steer was found by Connolly. It seems these brands are not always distinct, and that too is a circumstance to consider, whether it might serve as a reason why a stolen head of stock, after a brand was placed upon it, might be turned on the range when the former brands are not always distinct. Apparently they could not tell this Connolly brand without throwing the animal down and examining it closely; I will not say it was clipped, I don't think it was; anyhow they found it was Connolly's steer, and some conversation passed between Connolly and Mitchell Peterson and Mitchell stated to Connolly he had bought it from Bostwick.

The same occurred with reference to the Cobelle steer. Some time later apparently Mitchell meets Bostwick and, so far as the evidence shows, he does not reproach him, he does not accuse him of any wrong doing nor make any charge against him; he simply says, "Those were other men's cattle," and an allowance of \$60.00 was made for those two; an allowance was made by Bostwick to Mitchell for those two steers—Cobelle and Connolly steer. And still later, when Bostwick settles up with Charles Peterson, this allowance or deduction was made from what was coming from him. Now, that was about the middle of the roundup; at least, it was some time in the round-up, the evidence is in substance, on that score.

A little later, at the end of the round-up, occurs the incident testified to by Bostwick with reference to the "R" steer which went up the gulch, went after by Mitchell Peterson and Bird and the T anchor P steer, the last day of the roundup. It seems that they had already left some of the stock in Peterson's field; and they turned the bunch into Burd's field. Bostwick tells you of a conversation between him and Mitchell Peterson and some conversation when they were all driving down to Petersons when Walter was there, some enquiry about who owned the steer, and that it fell behind and that he and Mitchell stopped behind and talked about this steer, and they again apparently had struck a dim brand, for they threw that one down to examine the brand and they found it was Pambrun's steer, and, according to

Bostwick now this is, Bostwick said they laughed about it and thought they wouldn't take any chances on that one. But the next day, when it was in the corral at Peterson's or in the field at Petersons, there was again talk about this steer, and that he and Mitchell Peterson agreed that they would take a chance on it, if Bostwick would sell it to him, Mitchell Peterson, for the "Black-jack debt, some \$10.00, and it was so done. Now, there is a circumstance, along with the Connolly and the Cobelle steer for you to consider in determining whether Charles and Mitchell Peterson, and the Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from those circumstances whether these defendants knew or, as reasonable men, knew enough to know that if they made enquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe that they did, or such of them as you believe did, it will be your



duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold.

There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the T Anchor P steer took place because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted.

There is one thing that I will say, however, with reference to Bostwick. I think that it would be the view of the law, that Bostwick, if the defendants knew he was selling them stolen stock, that he would be an accomplice of theirs. That would lead you, of course, to give Bostwick's testimony serious consideration; scan it very carefully. You should do that anyhow, because he has been convicted of stealing this stock, and you take that into consideration in weighing his evidence; and you take his evidence, however, in connection with all the evidence and the circumstances to determine whether or not upon the whole you are satisfied beyond a reasonable doubt that the defendants, or either of them; are guilty as charged in respect to any one or more of the counts.

I do not believe that it is necessary for the court to review the situation any further. I think that



you, as reasonable men, having listened to this evidence, understand the situation and understand the circumstances that surrounded all these transactions, and can draw such inferences as are justified, that you feel are justified, as well as though the Court reviewed it further.

As I said before, you alone are the judges of the credibility of the witnesses and the weight to be given to testimony, and of the reasonable inferences and presumptions that can be drawn or should be drawn from testimony by reasonable men. You are not to place any strained construction upon it, but that which seems to you reasonable under all the circumstances.

When you retire to the Jury room you will select one of your number foreman and deliberate upon your verdict. Twelve of your number must agree upon any verdict that you find. You may find, if it would be a verdict of guilty, upon any one count; the Court would accept a disagreement of any other count. This is not to encourage you to disagree; the Court thinks you can agree on all these counts. That is left to you.

Any exceptions to the charge. All those you handed me that I did not give, of course, are refused.

BY MR. CARLETON: On the fullness and fairness of the charge it seems to make any exceptions would be a matter of supererogation, but in view of the condition of the law as to this specific charge of receiving stolen property, I think the defendant

jointly and severally will except to that portion, for the sake of the record, as to all those portions of the charge which imply or suggest that anything less than knowledge would be sufficient to convict.

BY THE COURT: Let the exception be noted.

BY MR. CARLETON: And also to that portion of the charge which permits the jury to take into consideration the T anchor P and any other animals which are not described in the indictment.

BY THE COURT: Let the exception be noted.

BY MR. CARLETON: And we will also, for the sake of the record, note the following:

The refusal of the court to give the requested Instruction No. 7; that is, really the Court gave it in part, relating to the uncorroborated testimony of an accomplice. Shall we state the reasons for the exception?

BY THE COURT: Oh no, you can take your exception to that portion, specifically pointing it out.

BY MR. CARLETON: Also to the modification which the Court gave of Instruction No. 9, and also the refusal of the Court to give the modification in Instruction No. 1 of Instruction No. 4.

BY THE COURT: Very well.

BY MR. CARLETON: Also the refusal of the Court to give Instruction No. 6.

BY THE COURT: Let it be noted.

BY MR. CARLETON: And also the refusal of the Court to give Instruction No. 10.

BY THE COURT: Very well.

Thereafter the Jury returned into Court for ad-

ditional instructions or information. And

BY THE COURT: It seems that sometime early in September Bostwick went to work for the Petersons on the roundup and he worked six weeks, and about the same time along during the roundup, Bostwick says, two weeks before the last sale was when Mitchell spoke to him about the Cobelle and Connolly steers, that they had been claimed by Connolly, and that it was agreed between them that an allowance of \$60.00 was to be made for these two steers. My recollection is that Buck said that when the conversation took place between Connolly and Mitchell with reference to these steers that it was about three weeks before the end of the roundup. Now after this occurred the roundup continued for either about two weeks, as Bostwick says, or about three weeks, as Buck says. Of course the recollection of weeks that far off is pretty difficult, you can appreciate that. During that time they were on the roundup, the two Peterson boys and Bostwick, and just at the end of the roundup was when they drove the herds up and brought some into Peterson's field and went on by and dropped the balance into Burd's field. And that night was apparently the time of the conversation, coming back from Bird's field, in reference to this T anchor P steer, which was one of the last buck sold; and you heard that conversation; you remember it as Bostwick related it. And the next day apparently there was some branding done at Peterson's field, and that was when the last sale was made of the six head,

and those six head, if I recollect rightly, are the ones that are set out in the first count. Is that right? ("That is right.") That is, four of them are. The T anchor P steer for some reason has not been set out in that count. Of course, the significance of the T anchor P steer and the Cobelle and Connolly steer is that, whether or not it should have put them on notice, Mitchell on notice, and whether or not from his relation with his brother and father they were all put on notice that Bostwick was selling stolen stock, and hence whether they had the knowledge, so far as knowledge is required by law, that they were buying and receiving stolen stock. So far as the evidence shows that is about all that occurred between the incident of the Cobelle and Connolly steers and the last sale. Of course, the Cobelle and Connolly steers, it is for you to determine whether or not it is significant from the standpoint that they must have known all the time or whether they knew all the time that they were buying stolen stock, in this, that it seemed to arouse no particular resentment on Mitchell's part that Bostwick had no right to sell those two; he apparently made no particular complaints so far as the evidence shows, made no effort of bringing Bostwick to Justice, accused him of nothing, simply went on dealing just the same. Is there anything further you would like to ask, any of you gentlemen?

JUROR HUSETH: It is all Bostwick's testimony as to what was going on?



THE COURT: By Buck, Buck tells you, remember, the Indian Buck, that he heard Connolly and Mitchell Peterson have this conversation about the Cobelle and Connolly steers. Of course, it is admitted by the defendants themselves that these steers named in the indictment were stolen steers, and that they received them and branded them, so that you have not by any means simply the Bostwick testimony, and the recollection that nobody has contradicted it.

Any exceptions?

BY MR. CARLETON: No, I think not, your Honor.

Whereupon said Jury again retired in charge of a sworn officer to further deliberate upon their verdict and after remaining out all of said Friday night without any verdict being agreed upon or any report to the court being made, said jury, and on the following day of Saturday, March 29, at about the hour of eleven o'clock A. M. returned into court and reported through their foreman that they had agreed upon a verdict as to the defendant Walter Peterson, but that they were unable to agree upon a verdict as to the two remaining defendants.

BY THE COURT: The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or



honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without farther expenditure of time and money. The defendants if guilty have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the Court's question, that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.

BY MR. CARLETON: As to that part relating to the expenses to the parties I wish to take exception.

BY THE COURT: The court notes that the

reference to expense or costs was in the mind of the defendant's counsel in his argument to the jury that the defendants in two trials upon this indictment had been put to great expenses and so had been punished enough and should be acquitted.

And thereupon, and for the third time, said jury retired in charge of a sworn officer to further deliberate upon their verdict and within less than one hour thereafter said jury returned into court the following verdict:

(TITLE OF COURT AND CAUSE.)

(VERDICT.)

(Here insert verdict.)

Whereupon the court discharged said jury from further consideration of said cause.

And thereupon, the time for receiving sentence being duly waived, the court pronounced judgment upon said verdict by sentencing the defendant, Mitchell Peterson, to the Federal penitentiary at Leavenworth, in the state of Kansas, for the period of one year and one day, and to pay a fine of Two Hundred Dollars and costs.

And thereafter and on said 29th day of March, 1913, upon application of counsel for the defendants duly made therefor, in open court, the court duly granted the said defendant, Mitchell Peterson, sixty days in addition to the statutory time in which to prepare, serve and file his bill of exceptions herein, on his petition for a new trial.

And now comes the defendant, Mitchell Peterson, by his counsel, and hereby presents the foregoing

as and for his bill of exceptions herein, upon his application for a new trial of this cause and moves the court that the same may be settled, signed and allowed and certified by the Judge as true and correct, as provided by law, and that the same be ordered filed as a record herein.

W. F. O'LEARY, and  
E. A. CARLETON,

Attorneys for defendant Mitchell Peterson.

Due service of the foregoing bill of exceptions is hereby admitted and copy thereof received this 2nd day of May, 1913.

J. W. FREEMAN,  
United States Attorney.

And now, on this 22 day of July, and within the time allowed by law and the orders of this court, the foregoing bill of exceptions, on petition for a new trial herein, is hereby settled and allowed, signed and certified as true and correct, and contains in substance all the evidence introduced on the trial of said cause, and the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,  
Judge.

(Endorsed): No. 1712. Title of Court and Cause. Defendant Mitchell Peterson's Bill of Exceptions. Received for the Court, May 2-1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. Filed and Entered Jul. 22, 1913. Geo. W. Sproule, Clerk.

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And thereafter, and on July 22, 1913, the defendant duly served and filed his Bill of Exceptions No. 2 herein as follows, to-wit:

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

MITCHELL PETERSON,

CHARLES PETERSON and

WALTER PETERSON,

DEFENDANTS.

No. 1712.

DEFENDANT, MITCHELL PETERSON'S

BILL OF EXCEPTIONS NO. 2.

BE IT REMEMBERED that the above entitled cause came on regularly for trial on the 26th day of March, 1913, before the court, sitting with a jury, duly impaneled to try said cause, the Hon. George M. Bourquin, judge, presiding.

The evidence being closed, and the arguments of counsel concluded, the court thereupon charged the jury. Whereupon the jury, at about the hour of four o'clock P. M. of Friday, March 28, 1913, retired in charge of a sworn officer to deliberate upon their verdict, and subsequently, and along in the evening of said day returned into court and requested the court to give them further instructions upon certain points in the case.

Thereupon, the court, in pursuance of said request of the jury, instructed the jury touching the

points upon which they had requested further instructions.

Whereupon, said jury again retired in charge of a sworn officer to further deliberate upon their verdict, and after remaining out all of said Friday night without any verdict being agreed upon or any report to the court being made, said jury, and on the following day of Saturday, March 29, at about the hour of 11 o'clock A. M. returned into court and reported through their foreman that they had agreed upon a verdict as to the defendant, Walter Peterson, but that they were unable to agree upon a verdict as to the two remaining defendants.

**BY THE COURT:** The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent



they have a right to be acquitted before their means are exhausted. You state to the Court that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is: if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.

Whereupon counsel for defendants duly excepted to all those portions of said instructions of the Court which relate to the cost or expense of the litigation, and which said exception was duly allowed by the court.

BY THE COURT: The court notes that the reference to expense or costs was in mind of the argument of defendants' counsel to the jury that the defendants in two trials upon this indictment had been put to a great expense and so had been punished enough and should be acquitted.

And thereupon, and for the third time, said jury retired in charge of a sworn officer to further deliberate upon their verdict, and within less than

one hour thereafter said jury returned into court the following verdict:

(TITLE OF COURT AND CAUSE.)

(VERDICT.)

(Here insert Verdict.)

Whereupon the court discharged said jury from further consideration of said cause.

And thereupon, the time for receiving sentence being duly waived, the court pronounced judgment upon said verdict by sentencing the defendant, Mitchell Peterson to the Federal penitentiary at Leavenworth, in the state of Kansas, for the period of one year and one day, and to pay a fine of Two Hundred Dollars, and costs.

Comes now Mitchell Peterson, one of the defendants above, by his counsel W. F. O'Leary and E. A. Carleton, and submits and proposes the foregoing as and for his bill of exceptions No. 2 herein, and respectfully asks the court that the same be signed, approved and allowed, as true and correct and ordered entered as a record herein.

W. F. O'LEARY and

E. A. CARLETON,

Attorneys for Defendant, Mitchell Peterson.

Due service of the foregoing bill of exceptions is hereby admitted this 4th day of April, A. D. 1913.

J. W. FREEMAN,

United States Attorney.

And now on this 22d day of July A. D. 1913, the foregoing bill of exceptions is hereby settled and allowed and signed and certified as true and correct,

and the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,

Judge.

(Indorsed): No. 1712. Title of Court and Cause. Defendant Mitchell Peterson's Bill of Exceptions No. 2. Received Apr. 4 1913. Geo. W. Sproule, Clerk. Filed July 22, 1913. Geo. W. Sproule, Clerk.

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And thereafter, and on the 11th day of August, 1913, the defendant duly filed his Assignment of Errors herein, and which said Assignment of Errors, is in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

No. 1712.

### ASSIGNMENT OF ERRORS.

Comes now the defendant above, by his counsel, and hereby makes and files the following assignment of errors, upon which he will rely, as follows, to-wit:

#### 1.

The Court erred in refusing to consider defendant's motion to dismiss the case and, upon the hearing of said motion, to dismiss said case.

#### 2.

It was error on the part of the Court to overrule defendant's objection to the introduction of any testimony in this case.

3.

It was error on the part of the court to admit any testimony in this case tending to show criminality respecting any cattle not described in the indictment herein.

4.

It was error on the part of the Court to overrule the objection to the following question:

Q. "And the cow, branded \_\_\_\_\_, and the steer branded CZ of Flat Tail?

A. "This steer was branded Y-K on the left ribs."

5.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not you found among the bunch of cattle a steer branded Lazy P diamond, on the left shoulder."

A. "This steer with the Lazy P Diamond on the right shoulder was branded RK on the left shoulder."

6.

It was error on the part of the Court to overrule the objection to the following question:

Q. "I will ask you whether or not in that bunch of cattle you found a cow branded HM on the left hip?

A. "Yes, sir."

7.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left hip?"

A. "The E2 brand belongs to an Indian by the name of Young Running Crane. There was a Y-K brand upon it at that time."

8.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Among these cattle that were driven in from the defendants, state whether or not there was an animal branded MF, belonging to Frank Monroe?"

A. "Yes, sir, there was."

9.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not there was an animal branded JT?"

A. "Yes sir, there was one cow with a JT on the left shoulder, and Y-K on the left hip."

10.

The Court erred in overruling the objection to the following question:

Q. "Did you find any of your bunch there?"

A. "Yes, sir."

11.

It was error on the part of the Court to sustain the objection to the following question:

Q. "You never accused any of these defendants of stealing it?"



12.

It was error on the part of the Court to sustain the objection to the following question:

Q. "State whether or not there was any difference of opinion between all of you there, including the Petersons, as to the brands that were on these animals and which Joe Brown put down in his book."

13.

It was error on the part of the Court to overrule the objection to the following question:

Q. "What have you got to say as to whether or not you all agreed as to the brands that were upon these cattle as they went through the chute?"

A. "They all agreed on the brands."

14.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Can you give us a description of any other cattle of this 6 or 7 head, branded there on the 21st day of October, besides the 25 and the 17 and the TS and the OO?"

A. "Yes, an R steer, I think, and an MW cow, and the T anchor P steer."

15.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Mr. Brown, I will ask you whether or not in this bunch of cattle, testified to as being driven from the Peterson field to the government field and there examined, there was a steer in that bunch

belonging to Dick Kipp?"

A. "Yes sir."

16.

It was error on the part of the Court to deny the defendants' motion at the close of the government's case, to dismiss the case against this defendant.

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### ERRORS IN INSTRUCTIONS.

17.

It was error on the part of the Court to refuse to give defendant's requested instruction No. 1, and likewise error to give said instruction as modified by the court, which said requested instruction is as follows:

"The court instructs the jury that before you can convict any of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment, or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of

any of them you must give the defendants the benefit of such doubt, and acquit."

The Court modified the foregoing instruction by inserting therein, after the word "knowledge," in the third subdivision thereof, the following, "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

19.

It was error upon the part of the Court to refuse to give defendant's requested instruction No. II, which requested instruction reads as follows:

"You are instructed that as to the question of whether or not the defendants, or any of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time they did receive and stolen cattle, if such is the fact that they did receive stolen cattle, then it is your sworn duty to acquit."

20.

It was error on the part of the Court to refuse to give defendants' requested instruction No. III, which requested instruction reads as follows:

"You are instructed that the statute, under which these defendants are prosecuted, makes knowledge

upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even though you should find that all or any part of the property in question was stolen and that all or any part of it was received by the defendants or any one of them, still, neither of those facts is sufficient for a conviction in this case. In affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration, the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secretly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand, whether or not the cattle were branded in broad day light and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consider-

ation whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question, with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and circumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit."

21.

It was error upon the part of the court to refuse to give defendants' requested instruction No. IV, and likewise error to modify said requested instruction as the court did, and to give the same as



modified. Said requested instruction reads as follows:

“You are instructed that under the admissions of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle, they actually knew that the same had been stolen or any of them. In order for a conviction of anyone of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.”

The Court modified said instruction by inserting after the word “knew,” in line four thereof, the following, “believed or reasonably suspected as aforesaid,” and also added to said requested instruction, after the word “knew” in the seventh line thereof, the following, “believed or reasonably suspicioned as aforesaid.”

## 22.

It was error on the part of the Court to refuse to give defendants’ requested instruction No. VI, which requested instruction reads as follows:

“You are instructed that in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants’ innocence, it is your

duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit."

23.

It was error on the part of the Court to refuse to give defendants' requested instruction No. VII, which said instruction reads as follows:

"The jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony."

24.

It was error on the part of the Court to refuse to give defendants' requested instruction No. IX, and likewise error to give the same as modified by the Court. Said instruction No. IX reads as follows:—

"If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or you have any reasonable doubt of it or if you find that the prosecution has failed to prove beyond a

reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it, knowing it to have been stolen, or you have any reasonable doubt of it then you must acquit the defendants.”

The modification of said instruction is made by the court as follows: In the third line thereof and after the word “knowledge”, the court inserted “or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth,” and, also in the next to the last line of said instruction and after the word “knowing”, the court added the following, “or believing or reasonably suspecting as aforesaid.”

25.

It was error on the part of the Court to refuse to give defendants’ requested instruction No. X, which said requested instruction reads as follows:

“The jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and Walter Peterson, and Mitchell Peterson, you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment, but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is any single fact proved to the satisfaction of the Jury by a preponderance of the evidence, which is inconsistent with said defendants’

guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.”

26.

It was error on the part of the Court to instruct the jury as follows:

“But, of the steer T anchor P of Dave Pambrun and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them, received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment, these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment.”

27.

It was error on the part of the Court to instruct the Jury as follows:—

“If the jury believes that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant



that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable men, a man of ordinary intelligence, would have acted under like circumstances; you have a right to believe that they could and did draw the same inferences from the circumstances and the situation that any man of ordinary intelligence would draw, and of course, it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know."

## 28.

It was error on the part of the Court to instruct the Jury as follows:

"If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an inquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge."

## 29.

It was error on the part of the Court to instruct the Jury as follows:—

"If the circumstances led the defendants or de-



fendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make inquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.”

30.

It was error on the part of the Court to instruct the Jury as follows:

“From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth.”

31.

It was error on the part of the Court to instruct the Jury as follows:

“Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.”

32.

It was error on the part of the Court to instruct

the Jury as follows:

“You are instructed that, under the admissions of the defendants, that the gist of this evidence is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge, as heretofore defined to you, that the property had been stolen at the time it was purchased.”

33.

It was error on the part of the Court to instruct the Jury as follows:—

“If you believe from the testimony and all the facts and circumstances in this case that the defendants, or some of them, purchased the property in good faith, without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the

prosecution has feiled to prove beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting, as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants.”

34.

It was error on the part of the Court to instruct the Jury as follows:

“Now, there is a circumstance along with the Connolly and Cobelle steer for you to consider in determining whether, Charles Peterson and the Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from these circumstances whether these defendants knew, or as reasonable men, knew enough to know that if they made inquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe

that they did, or such of them as you believe did, it will be your duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold."

## 35.

It was error on the part of the Court to instruct the Jury as follows:

"There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the T anchor P steer took place, because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted."

## 36.

It was error on the part of the Court and after said Jury had been out deliberating upon their verdict all night, and part of the day, and then had returned into court, and announced through their foreman, that they had agreed upon a verdict as to the defendant Walter Peterson, but they were unable to agree upon the two remaining defendants, for the Court to instruct said Jury as it did, as follows:—

"The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before



a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are, or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants if guilty have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if innocent they have a right to be acquitted before their means are exhausted. You state in answer to the Courts' question that you stand seven to five. If seven are for acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire."

W. F. O'LEARY and

E. A. CARLETON,



Attorneys for Defendant.

Due service of the foregoing Assignment of Errors is hereby admitted this 11th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

(Indorsed): Title of Court and Cause. Assignment of Errors. Filed August 11th, 1913. Geo. W. Sproule, Clerk.

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And thereafter, and on the 11th day of August, 1913, the said defendant duly filed his petition for a Writ of Error herein, and which said petition is in the words and figures, as follows, to-wit:

(TITLE OF COURT AND CAUSE.)

PETITION FOR WRIT OF ERROR.

Comes now the defendant, Mitchell Peterson, and petitions this Court for a writ of error herein, and says:

That on or about the 29th day of March 1913, the above entitled Court entered a judgment herein against the defendant, wherein the said defendant was sentenced to be confined and imprisoned in the United States Penitentiary at Leavenworth, in the state of Kansas, for the term of one year at hard labor and to pay a fine of \$200 and costs, taxed in the sum of \$1189.35 for the alleged offense of the violation of the laws of the United States respecting the buying and receiving of stolen property knowing it to have been stolen; that in said judgment and the proceedings had prior thereto in

said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit; for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit at the City of San Francisco, in the State of California.

W. F. O'LEARY and

E. A. CARLETON,

Attorneys for Defendant.

Service accepted August 11, 1913.

J. W. FREEMAN,

U. S. Attorney.

(Indorsed): Title of Court and Cause. Petition for Writ of Error. Filed Aug. 11th 1913. Geo. W. Sproule, Clerk.

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And thereafter, and on the 11th day of August, 1913, an order allowing said Writ of Error was duly made and entered herein, which said order is in the words and figures as follows, to-wit:

(TITLE OF COURT AND CAUSE.)

ORDER ALLOWING WRIT OF ERROR.

On this 11th day of August, 1913, comes the defendant, Mitchell Peterson, by his attorneys, and

files herein and presents to the court his petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, and praying, also, that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be presented to the United States Circuit Court of Appeals, Ninth Circuit, and that such other and further proceedings may be had as are meet and proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of \$2000.00 and that upon the due execution and approval of said bond, the same shall act as a supercedeas herein.

GEO. M. BOURQUIN,

Judge.

(Indorsed.): Title of Court and Cause. Order Allowing Writ of Error. Filed and Entered in Order Book Aug. 11, 1913. Geo. W. Sproule, Clerk.

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And thereafter, and on the 16th day of August, 1913, the defendant duly filed his bond on writ of error, and which said Bond is in the words and figures as follows, to-wit:

(Title of Court and Cause.)

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, Mitchell Peterson as principal and Edward T. Broadwater and Simon Pepin of the State of Montana, as securities are held and firmly bound

unto the United States of America in the full sum of \$2000. to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of August, 1913.

WHEREAS, lately, at the District Court of the United States for the District of Montana, in a suit depending in said Court between the United States of America as plaintiff and Mitchell Peterson as defendant, a judgment was entered against the defendant sentencing him to be confined and imprisoned at the United States Penitentiary at the city of Leavenworth, in the State of Kansas, for the term of one year at hard labor, and that he pay a fine of \$200, and costs, taxed in the sum of \$1189.35; and,

WHEREAS, the defendant, Mitchell Peterson, is desirous of prosecuting an appeal from the judgment and sentence of said United States District Court to the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, in the State of California, and has obtained a writ of error therefor, and filed a copy thereof in the office of the Clerk of said District Court of the United States, to reverse the judgment in the aforesaid suit, and a citation, directed to the United States of America and to the Attorney General of the United States, citing said parties to be and ap-

pear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be heard at the City of San Francisco, in the State of California, within sixty days from the 16th day of August, 1913.

Now, the condition of the above obligation is such that if the said defendant, Mitchell Peterson, shall prosecute said writ of error to effect and answer all demands and costs if he fail to make said appeal good, then the above obligation to be void. Otherwise to be in full force and virtue.

MITCHELL PETERSON. (Seal.)

EDWARD T. BROADWATER, (Seal.)

SIMON PEPIN. (Seal.)

UNITED STATES OF AMERICA,

State of Montana,

County of Hill.—ss.

Edward T. Broadwater and Simon Pepin sureties to the foregoing bond, being each duly severally sworn, each for himself says:

That he is responsible, and a freeholder or householder within the State of Montana, and is worth the sum specified in the foregoing undertaking as a penalty thereof over and above all his just debts and liabilities and property exempt by law from execution.

EDWARD T. BROADWATER,  
SIMON PEPIN

Subscribed and sworn to before me this 13 day of August, 1913.

CHAS. A. ROSE,  
Notary Public for the State of Montana,



residing at Havre, Montana. My Commission expires on the 18 day of April, 1916.

(Notarial Seal.)

Aproved. GEO. M. BOURQUIN,  
Judge.

(Endorsed): Title of Court and Cause. Bond.  
Filed August 16th, 1913. Geo. W. Sproule, Clerk.

Thereafter on Aug. 16th, 1913, a Writ of Error was duly issued and filed herein, which is annexed hereto and is in the words and figures as follows, to-wit:

*In the District Court of the United States, District  
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON,

Defendant.

Writ of Error.

The President of the UNITED STATES OF AMERICA, to the Judge of the District Court of the United States, for the District Montana,  
GREETING:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court of the United States for the District of Montana, before you, between the United States of America, and Mitchell Peterson, manifest errors hath happened, to the great damage of the said Mitchell Peterson, as by his complaint and the record herein appears, and it being fit

that the errors, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, California, together with this writ, so that you may have the same at the said City of San Francisco, California, within thirty days from the date of this writ, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid may be inspected, and said United States Circuit Court of Appeals may cause further to be done therein to correct said errors, if any, and to do what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable E. D. White, Chief Justice of the United States, this 16th day of August, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States, the One Hundred and Thirty-eighth.

GEO. W. SPROULE,

Clerk of the District Court of the

United States, for the District of Montana.

(Seal.)

Due service of the within writ of error is hereby

admitted this 16th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

Return of Writ of Error.

The answer of the Judge of the District Court of the United States, for the District of Montana.

The record and all proceedings of the plaintiff in error wherein mention is within made, with all things touching the same I hereby certify, under the seal of said Court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded. By the Court:

GEO. W. SPROULE,

Clerk.

By C. R. GARLOW,

Deputy Clerk.

(Endorsed): Filed Aug. 16th, 1913, Geo. W. Sproule, Clerk.

And thereafter, and on the 16th day of August, 1913, a Citation herein was duly issued and filed and which is annexed hereto, and being in the words and figures following, to-wit:

*In the District Court of the United States, District  
of Montana.*

---

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON,

Defendant.

CITATION.

UNITED STATES OF AMERICA.—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Montana wherein Mitchell Peterson is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done, to the parties in that behalf.

Witness, the Honorable Geo. M. Bourquin, Judge of the District Court United States for the District of Montana and the seal of said District Court, this 16th day of August, 1913.

GEO. M. BOURQUIN,

United States District Judge presiding in the  
said District Court of the State of Montana.

Attest: GEO. W. SPROULE, Clerk.

W. F. O'LEARY,

E. A. CARLETON,

Attorneys for Defendant.

Service of the foregoing citation is hereby admitted this 16th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

(Endorsed): Title of Court and Cause. Citation  
Filed August 16th, 1913. Geo. W. Sproule, Clerk.

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*Clerk's Certificate to Transcript of Record.*  
United States of America,  
District of Montana.—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing Volume, consisting of Two hundred and six pages, numbered consecutively from one to two hundred and six, is a true and correct transcript of the pleadings, appearances, orders, judgment, and all proceedings had in said cause, and the whole thereof, as appears from the original records and files of said Court in my possession; and I do further certify and return that I have annexed to said transcript the original Writ of Error and Citation, in said cause with admission of service thereof.

I further certify that the costs of the transcript of the record amount to the sum of \$25.60, and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said United States District Court, District of Montana, this 9th day of September, A. D. 1913.

GEO. W. SPROULE,

Clerk.

By C. R. GARLOW,

Deputy Clerk.

(Seal.)

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MITCHELL PETERSON,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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**Brief for Plaintiff in Error.**

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STATEMENT OF CASE.

The plaintiff in error, Mitchell Peterson, brings this cause to this Court by a writ of error sued out of the District Court of the State of Montana. In the lower court, judgment was rendered against him upon a verdict of guilty, and he was sentenced to a term of one year and one day at hard labor in the Federal Penitentiary at Leavenworth, Kansas, and

to pay the costs of the prosecution, taxed in the sum of \$1189.35.

Rec. 17.

The indictment, which is in four counts, charges defendants with buying and receiving some forty-four head of cattle, *knowing* them to have been stolen.

Rec. 2-7.

The jury found plaintiff in error guilty as charged in Count One of the indictment, and not guilty as to the three remaining counts "and recommend the greatest clemency by the Court."

Rec. 14.


In imposing the sentence it did, the Court entirely disregard the recommendation of the jury for clemency and fixed the punishment as stated.

Defendant, Mitchell Peterson, was convicted of buying and receiving only three head of cattle, as charged in Count One, out of forty-four head charged.

Rec. 2 and 14.

The three head which he was found guilty of buying and receiving, knowing them to have been stolen, were property of Indians, wards of the Government, and are thus described:

One steer, branded "25" on the left ribs, of the property of Calf Looking, an Indian person;

One cow, branded  on the left thigh, of the property of Catches Two, an Indian person; ~~##~~

One cow, branded OO on the left hip of the

~~##~~ "One cow, branded 17 on the left ribs of the property of Bad Manage."



property of Henry No Bear, an Indian person.

Rec. 23.

Plaintiff in error, as the record shows, page 9, was jointly indicted with four others, his father, Charles Peterson, and Walter, Oscar and Melvin Peterson, his brothers. The case had been tried before by the Hon. Carl Rasch, then District Judge, with the result that Oscar and Melvin were acquitted and the three remaining defendants, convicted. Judge Rasch granted a new trial. This writ of error is sued out on the conviction of the plaintiff in error at the second trial before the Hon. Geo. M. Bourquin, the successor of Judge Rasch, the second trial having been held in March, 1913.

Rec. 32.

Charles, the father and Walter, the brother, were duly acquitted at the second trial.

Rec. 15.

The indictment was returned Dec. 21st, 1910, which charged the offense as having been committed "on the 21st day of October, A. D. 1910" upon the Blackfeet Indian Reservation, in Montana.

Rec. 2-9.

All the original defendants, except Charles Peterson, the father, are wards of the Government and carried on the rolls at the Indian Agency as such.

On March, 24, 1913, plaintiff in error filed a motion, supported by a number of affidavits, to dismiss the case, for lack of seasonable prosecution, in

which it was made to appear, among other things, that from Oct. 14th, 1911, when defendant's motion for a new trial was granted, (Rec. 19), down to March, 26th, 1913, when the case was tried for the second time, (Rec. 32), that three terms of Court had been held with a jury, at any one of which this case could have been tried "if it was ever intended or desired" to try plaintiff in error again.

Rec. 19.

It is made to appear in the affidavits filed in support of the motion to dismiss, that the long delay in bringing said cause to trial was wholly due to the prosecution and that appellant, at all times, has been anxious to have said case disposed of.

Rec. 21; 24-27.

The Court declined to entertain or hear the motion to dismiss and ordered the jury empaneled. A jury being empaneled, and a witness called and sworn, counsel for appellant objected to the introduction of any testimony for the reasons stated in the aforesaid motion. The objection being overruled, an exception was taken. The foregoing transactions were settled in a bill of exceptions and are designated in the record as Bill of Exceptions No. 1.

Rec. 27-31.

At about the hour of 4 P. M. of March 28, 1913, the jury retired to consider their verdict and in the evening of said day, returned into Court for further instructions, which being given, they again retired to deliberate upon their verdict. After remaining

out all night and on March 29th, at 11 A. M., they again returned into Court and reported a verdict as to defendant, Walter Peterson, and a disagreement as to Mitchell Peterson and his co-defendant, Charles Peterson. Thereupon the Court addressed the jury as follows:

“The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have a right to be acquitted before their means are exhausted. You state to the Court that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for

conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.”

Rec. 175-176.

To which remarks and instructions of the Court, counsel for the plaintiff in error duly excepted in so far as the same related to the cost or expense of the litigation, which said exception was duly allowed by the Court.

Rec. 176.

The several questions involved relate to the aforesaid action and rulings of the Court in (a) declining to entertain or hear the motion to dismiss the case; (b) to overruling the objection to the introduction of any testimony; (c) to instructing the jury as it did as to the cost of the prosecution of the case and after the jury had reported a disagreement as to appellant, and are raised by the exceptions taken which have been settled in the several bills of exceptions. The other questions involved relate to the numerous exceptions to the rulings of the Court in admitting evidence and in sustaining objections to questions asked by counsel for plaintiff

in error, and are raised by proper exceptions to said rulings, as fully appears in the Specifications of Error. Likewise, and particularly, exceptions to many of the instructions of the Court, as also exceptions to the refusal of the Court to give certain requested instructions. There is also involved the sufficiency of the evidence to sustain a conviction in this case, which is raised by the writ of error.

Still another question involved is the question of the integrity of the judgment in the absence of an affirmative showing that defendant below was arraigned and plead to the indictment.

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### SPECIFICATIONS OF ERROR.

1. It was error on the part of the Court to refuse to entertain or hear the motion to dismiss the case.

Rec. 27-29.

2. It was error on the part of the Court to refuse to dismiss the case.

Rec. 27-29.

3. It was error on the part of the Court to overrule appellant's objection to the introduction of any testimony.

Rec. 30-34.

4. It was error on the part of the Court to allow testimony calculated to show the larcency of other animals than those described in the indictment.



Rec. 37 and 39-40

5. It was error on the part of the Court to overrule the objection to the question found on page 39 of the Rec., as follows:

Q. And the cow branded,—and the steer branded CZ of Flat Tail?

A. This steer was branded Y bar K on the left ribs.

Rec. 39.

6. It was error on the part of the Court to overrule the objection to the following question:

Q. I will ask you whether or not in that bunch you found a cow branded HM on the left hip?

A. Yes, sir.

Rec. 40-41.

7. It was error on the part of the Court to overrule the objection to the following question:

Q. State whether or not you found a brand,—P lazy S on the left shoulder, a cow?

A. Yes, sir.

Rec. 41.

8. It was error on the part of the Court to overrule the objection to the following question, found at the bottom of page 41 of the record, as follows:

Q. State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left shoulder?

A. The E2 brand belongs to an Indian by the name of Young Running Crane. There was a

Y—K brand upon it at that time.

Rec. 42.

Note: Attention is called to the fact that, at this point in the record, counsel for appellant, asked that the record show that appellant objected to the introduction of all testimony regarding any animals not described in the indictment herein and that they save an exception to the ruling of the Court in each instance in admitting such testimony.

Rec. 42.

9. It was error on the part of the Court to sustain the objection to the following question, asked of Indian Agent, McFatrige:

Q. At that time you had not formed any opinion or purpose to prosecute the Petersons for stealing that stock?

Rec. 56.

10. It was error on the part of the Court to sustain the objection to the following question asked the witness Joe Brown:

Q. Some Bostwick stock had been shipped before?

Rec. 61.

11. It was error on the part of the Court to overrule the objection to the following question asked the witness Joe Brown:

Q. Among these cattle that were driven in from the defendants state whether or not there was an animal branded MF belonging to Frank Monroe?

Rec. 61-62.

12. It was error on the part of the Court to overrule the objection to the following question found near the top of page 62 of the record:

Q. State also whether or not there was an animal branded JT?

Rec. 62.

13. It was error on the part of the Court to sustain the objection to the following question:

Q. You don't know whether it had been sold or disposed of or not?

Rec. 62.

14. It was error on the part of the Court to overrule the objection to the following question asked of witness Old Rock:

Q. Can you tell us the brand of the cattle, your brand?

Rec. 63.

15. It was error on the part of the Court to overrule the objection to the following question asked of said witness:

Q. I will get you to state whether you were down at the Agency the first part of November of 1910 about two years ago?

A. I was.

Rec. 63.

16. It was error on the part of the Court to overrule the objection to the following question:

Q. Did you find any of your cattle there?

A. Yes sir.

Rec. 64.

17. It was error on the part of the Court to refuse to strike out all of the testimony of the witness Old Rock, as found on pages 62-64 of the record.

Rec. bottom page 64.

18. It was error on the part of the Court to sustain the objection to the following question asked of the witness Dave Pambrum:

Q. You never accused any of these defendants of stealing it?

Rec. 66.

19. It was error on the part of the Court to sustain the objection to the question asked of the witness Henry Marceau:

Q. You never accused any of these defendants of stealing it?

Rec. 68.

20. It was error on the part of the Court to refuse to strike out all the testimony of the witness Louis Monroe, as contained on pages 74 and 75 of the record.

Rec. 74-75.

21. It was error on the part of the Court to overrule the objection to the following question asked of the witness Albert Goss:

Q. State whether or not there was any difference of opinion between all of you there including the Petersons as to the brands there were upon these animals and which Joe Brown put down in his book?

A. There was no difference of opinion.

Rec. 80.

22. It was error on the part of the Court to overrule the objection to the question asked of Matt Lytle:

Q. What have you to say as to whether or not you all agreed as to the brands that were upon these cattle as they went through the chute.

Rec. bottom 83 and top 84.

23. It was error on the part of the Court to overrule the objection to the following question asked of the witness Bostwick:

Q. Can you give us a description of any other cattle of this 6 or 7 head branded there on the 21st of October besides the 25 and the 17 and the TS and the OO?

A. Yes, an R steer I think, and an MW cow and the T anchor P steer.

Rec. 98.

23. It was error on the part of the Court to allow any testimony regarding the T anchor P steer.

Rec. 98.

24. It was error on the part of the Court to overrule the objection to the following question asked of the witness Joe Brown:

Q. Mr. Brown I will ask you whether or not in this bunch of cattle testified to as being driven from the Peterson field to the government field and there examined whether or not there was a steer in



that bunch belonging to Dick Kipp?

A. Yes sir. On the steer as I have it the brand is an AK; there was also the Y—K brand on the left ribs. That was ID stuff also.

Rec. 126.

25. It was error on the part of the Court to overrule the motion of plaintiff in error at the close of the testimony in the case to dismiss the same or to instruct the jury to return a verdict of not guilty.

Rec. 127-128.

### ERRORS IN INSTRUCTIONS.

26. It was error on the part of the Court to refuse to give defendant's requested instruction No. 1, and likewise error to give said instruction as modified by the court, which said requested instruction is as follows:

The court instructs the jury that before you can convict any of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment, or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the

indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of any of them you must give the defendants the benefit of such doubt, and acquit.

The Court modified the foregoing instruction by inserting therein, after the word "knowledge," in the third division thereof, the following, "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

Rec. 182-183.

27. It was error upon the part of the Court to refuse to give defendant's requested instruction No. II, which requested instruction reads as follows:

You are instructed that as to the question of whether or not the defendants, or any of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time they did if such is the fact that they did receive stolen cattle, receive any stolen cattle, then it is your sworn duty to acquit.

Rec. 183.

28. It was error on the part of the Court to refuse to give defendants' requested instruction No. III, which requested instruction reads as follows:

You are instructed that the statute, under which these defendants are prosecuted, makes knowledge upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even, though you should find that all or any part of the property in question was stolen and that all or any part of it was received by the defendants or any one of them, still, neither of those facts is sufficient for a conviction in this case. In affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration, the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secret-

ly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand, whether or not the cattle were branded in broad day light and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consideration whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question, with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and cir-

cumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit.

Rec. 183-185.

29. It was error upon the part of the court to refuse to give defendants' requested instruction No. IV, and likewise error to modify said requested instruction as the court did, and to give the same as modified. Said requested instruction reads as follows:

You are instructed that under the admissions of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle, they actually knew that the same had been stolen or any of them. In order for a conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.

The Court modified said instruction by inserting after the word "knew," in line four thereof, the following, "believed or reasonably suspected as aforesaid," and also added to said requested instruction, after the word "knew" in the seventh line thereof, the following, "believed or reasonably



suspicioned as aforesaid.”

Rec. 185-186.

30. It was error on the part of the Court to refuse to give defendants’ requested instruction No. VI, which requested instruction reads as follows:

You are instructed that in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants’ innocence, it is your duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit.

Rec. 186-187.

31. It was error on the part of the Court to refuse to give defendants’ requested instruction No. VII, which said instruction reads as follows:

The jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony.

Rec. 187.

32. It was error on the part of the Court to

refuse to give defendants' requested instruction No. IX, and likewise error to give the same as modified by the Court. Said instruction No. IX reads as follows:

If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or you have any reasonable doubt of it or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it, knowing it to have been stolen, or you have any reasonable doubt of it then you must acquit the defendants.

The modification of said instruction is made by the court as follows: In the third line thereof and after the word "knowledge," the court inserted "or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth," and, also in the next to the last line of said instruction and after the word "knowing," the court added the following, "or believing or reasonably suspecting as aforesaid."

Rec. 187-188.

33. It was error on the part of the Court to refuse to give defendants' requested instruction No. X, which said requested instruction reads as follows:

The jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and Walter Peterson, and Mitchell Peterson, you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is any single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with said defendants' guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.

Rec. 188-189.

34. It was error on the part of the Court to instruct the jury as follows:

But, of the steer T anchor P of Dave Pambrum and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them, received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment, these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they

received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment.

Rec. 189.

35. It was error on the part of the Court to instruct the jury as follows:—

If the jury believes that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable men, a man of ordinary intelligence, would have acted under like circumstances you have a right to believe that they could, and did draw the same inference from the circumstances and the situation that any man of ordinary intelligence would draw, and of course, it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know.

Rec. 189-190.

36. It was error on the part of the Court to instruct the jury as follows:

If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an inquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge.

Rec. 190.

37. It was error on the part of the Court to instruct the jury as follows:

If the circumstances led the defendants or defendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make inquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.

Rec. 190-191.

38. It was error on the part of the Court to instruct the jury as follows:

From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than



one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth.

Rec. 191.

39. It was error on the part of the Court to instruct the jury as follows:

Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.

Rec. 191.

40. It was error on the part of the Court to instruct the jury as follows:

You are instructed that, under the admissions of the defendants, that the gist of this evidence is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show

that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge, as heretofore defined to you, that the property had been stolen at the time it was purchased.

Rec. 191-192.

41. It was error on the part of the Court to instruct the jury as follows:

If you believe from the testimony and all the facts and circumstances in this case that the defendants, or some of them, purchased the property in good faith without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting, as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants.

Rec. 192-193.

42. It was error on the part of the Court to instruct the jury as follows:

Now, there is a circumstance along with the Connolly and Cobelle steer for you to consider in determining whether, Charles Peterson and the

Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from these circumstances whether these defendants knew, or as reasonable men, knew enough to know that if they made inquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe that they did, or such of them as you believe did, it will be your duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold.

Rec. 193-194.

43. It was error on the part of the Court to instruct the jury as follows:

There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the

T anchor P steer took place, because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted.

Rec. 194.

44. It was error on the part of the Court and after the jury in the case had been out all night deliberating on their verdict, and a part of the following day, and having returned into court, and having announced through their foreman, that they had agreed upon a verdict, as to the defendant Walter Peterson, and disagreed as to plaintiff in error, to make the remarks which the Court made, as found in the record in this case at the bottom of page 194 and top of page 195, and which remarks are also found in this brief on page 5.....6....

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## ARGUMENT.

While numerous errors are assigned in the brief, for convenience of argument, they may be practically all considered under six heads as follows:

First, did plaintiff in error have a speedy trial within the meaning of the Federal Constitution?

Second, was the great volume of testimony allowed to go in, over objection, tending to show larceny of other cattle not charged in the indictment and concerning which plaintiff in error had

no notice or opportunity to prepare for trial, competent under this indictment?

Third, was error committed in the instructions wherein the jury were told that *actual knowledge* that the cattle had been stolen, was not necessary to convict, but that if they had a “reasonable suspicion” that they had been stolen or failed to follow up any suspicion they had, for fear they would learn the truth, that was sufficient.

And, likewise, was error committed by the refusal of the Court to give certain requested instructions?

Fourth, did the Court commit reversible error in making the remarks it did to the jury, under the circumstances, wherein it told them of the immense cost of the prosecution as an inducement to get them to agree to a verdict. (The record shows that within less than one hour after said remarks were made the jury did agree.) (Rec. 176-177.), and that the conviction of defendant was brought about by them.

Fifth, is the evidence sufficient to sustain a verdict of conviction in this case?

Sixth, can a judgment in a criminal case, pronounced upon a verdict of guilty on a felony charge, be upheld, when the record fails to affirmatively show an arraignment or plea of the defendant?

Upon all six of these points, save, perhaps, the first, we shall respectfully insist that the judgment ought not to be upheld and that the case should be



sent back for another trial.

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## SPEEDY TRIAL.

As to the first point, that of a speedy trial, much might be said in the light of Article VI of Amendments to the Constitution, which reads:

“In a criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

In the preceding article, 5, it is provided, *inter alia*, that no person “shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law.”

A motion to dismiss raises the question as to what is a speedy trial. Chief Justice Wade in the case of the United States against Fox, 3 Mont. 516, defines the meaning of the term within the constitutional provision, where he says:

“But both the constitution and the law contemplate that the trial should be had, after a lapse

of such time as, in the exercise of reasonable diligence, may be required to prepare for trial.” And again on page 517 he says: “And so on the other hand the law will not tolerate any neglect or laches on the part of the prosecution in bringing the defendant to trial. \* \* \* A person charged with crime, whether in prison or on bail, has the right to demand diligence on the part of the prosecution, to the end that he may speedily know whether he is to be convicted or acquitted.”

And further on the same page he says: “A speedy trial, to which a person charged with crime is entitled under the Constitution then is, a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by a fair and honest exercise of reasonable diligence, to prepare for trial, and if the trial is delayed or postponed beyond such period when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial.”

To the same effect is *ex parte Stanley*, 4 <sup>New</sup> ~~York~~ <sup>Jer.</sup>, 116; *Klock vs. the People*, 2 Park. 676. While there is no Federal Statute, that I am aware of that provides a specific time within which trial must be had, the Statutes of different states do provide such a time, and if a trial is not had within such a time, the court must dismiss the prosecu-

tion. Section 9520 of the Penal Code of the State of Montana provides as follows: "The Court unless good cause to the contrary is shown, must order the prosecution dismissed in the following cases:

I. Where a person has been held to answer for a public offense, if the information is not filed against him, within thirty days thereafter, or such time has not been extended by the Court or judge.

II. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six months after the filing of the indictment or filing of the information."

California has the same provision. Sec. 1382, Penal Code of California. In the case of *Beavers vs. Haubert*, 198 U. S. on page 86, the court says:

"Undoubtedly the defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the constitution." These provisions of the different states the courts hold to be mandatory.

*People vs. Morino*, 85 Cal. 515, 24 Pac. 892;

*Ex parte Turman*, 84 Am. Dec. quoting from the syllabus:

"Constitutional provision guaranteeing to every citizen speedy and public trial in all criminal accusations, is intended to prevent the government from oppressing its citizens, by holding criminal prosecutions suspended over them, and to prevent delay in the administration of justice by obliging the courts

to proceed with dispatch in the trial of criminal charges.”

In the case of *In re Begerow*, 133 Cal. 249, 65 Pac. 828, 85 Am. State Rep. 178 it is expressly held that this statute is mandatory. In the exhaustive note to this case, reported in the 85 Am. State Reports, *supra*, the question of a speedy trial is canvassed where it is said: “A speedy trial does not mean a trial actually upon the presentation of the indictment or the arrest upon it.”

“It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation; *ex parte Stanley* 4 New York, 113. It is a trial at such a time after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by a fair and honest exercise of reasonable diligence to prepare for trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which a trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial of the defendant’s right to a speedy trial. *United States vs. Fox*, 3 Mont. 512, 517, per Wade Chief Justice. A speedy trial is one conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious and oppressive delays created by the ministers of justice: *Nixon vs. State*, 2 Seedes & M. 497, 41 Am.

Dec. 601.”

State vs. Mollineaux, 149 Mo. 646; 51 S.  
W. 462.

## REMEDIES OF DEFENDANT WHEN DENIED A SPEEDY TRIAL.

A defendant who has been denied a speedy trial has a right to move the dismissal of the prosecution on that ground.

People vs. Camilo, 69 Cal. 540; 11 Pac. 128;  
State vs. Hansen, 10 Wash. 235; 38 Pac.  
1023;

People vs. Morino, 85 Cal. 515, 24 Pac. 892.

When the trial is so long delayed, witnesses become scattered and the facts of the case, such is the frailty of human memory, become less certain and witnesses are not as well prepared to testify to what the facts actually are.

Moreover, there must come a time sometime after the defendant has been indicted, or after he has been convicted and a new trial granted, as in the case at bar, when to try him again on the same indictment would be a denial of his constitutional rights. Such we claim is the case at bar. Term after term of court with a jury has been held since the motion for a new trial was granted, and a period of something over three years has elapsed since the filing of the indictment in this case.

### Rec. 9.

Was the plaintiff in error in this case granted a speedy trial in being compelled to go to trial some



three years after the alleged crime was committed? The papers filed in support of the motion to dismiss, and which are not even attempted to be contradicted in any way, show that the indictment herein was filed December 21, 1910; the case was first tried in June, 1911, and a new trial was granted on the 14th day of October, 1911, and that this case was not again tried until March, 1913.

Rec. 19-31.

True it is that cases may be found holding that it is incumbent upon the defendant to formally demand a speedy trial. The record does not disclose that he did. Thinking that the prosecution had been abandoned and that, ultimately, the case would be dismissed, defendant took no action. But suppose he had waited five or ten years, could he then have been constitutionally tried? In other words, is there no limit of time, under the Constitution, and even when a defendant makes no formal demand for a trial, in which he can be legally tried? It would seem that there is and that the limit had been reached in the case at bar when appellant was last tried, and that his motion to dismiss the case should have been granted.

### ADMISSIBILITY OF EVIDENCE.

Over objection, the Court admitted a large amount of testimony, which it is claimed is evidence of the commission of similar offenses. The theory upon which this was admitted, as stated by the

Court, in its instructions, record 146-147, was to show intent or scienter.

This testimony related to other animals which the defendants had in their possession at the time of the general roundup of their stock, and which bore some other brand beside their own. Concerning all of such animals, there is no evidence in this record, that plaintiff in error stole, or bought or received them, knowing them to be stolen. Among such number was the CZ animals of Flat Tail, top of page 39 of the record; a JT cow, record 39; a Lazy P diamond steer, record 39; the T anchor P steer, record 40; an HM cow, record 40. As to this last named animal the count in the indictment, in which it was found had been dismissed at the time of the last trial, yet the Court permitted evidence of it to go in.

Rec. 40-41.

Other animals of this character were a P Lazy S; an ER steer; E2 steer, record 41; and a DC animal. When these animals were bought or when they were stolen, if stolen at all, or when they were received, the record is silent. Speaking of this character of evidence, in Vol. 2 of Wharton's Crim. Law, 11th Ed., page 1499, it is said:

“And where there is a marked difference in the time and character in the receptions, one cannot be received to prove the other.”

As we understand the rule, to make evidence of similar acts competent, it must relate to prior acts,

not subsequent ones. The District Attorney failed to prove when the alleged similar acts were committed, whether before or after, or at the time the offenses alleged in the indictment, are alleged to have been committed. We understand Mr. Wigmore lays down the same rule, 1 Wigmore on Evidence, Secs. 301, 302 and 304. In section 302 this author says:

“And the *prior* doing of other similar acts, whether clearly a part of the scheme or not, is useful, as reducing the possibility that the act in question was done with innocent intent.”

Prettyman v. U. S. 180 Fed. 30; 103 C. C. A. 384; U. S. v. Brenner 139 U. S. 288.

When this testimony was first offered, under the promise of the District Attorney to connect it up with the defendants, the Court admitted it over objection, but the District Attorney failed to connect it up. Manifestly, all this class of testimony was greatly prejudicial to the plaintiff in error. The defendants never denied buying, receiving and branding the animals, but they have always denied that any of them were purchased with knowledge that they had been stolen. This was the only point in the whole case.

## WITHDRAWING TESTIMONY FROM THE JURY.

The Court, evidently appreciating the fact that the District Attorney had failed to connect this class of evidence up as he had promised, undertook in its instructions, to withdraw a portion of the same from the consideration of the jury. The Court instructed the jury upon this point as follows:

“In respect to this indictment, first, the Court will withdraw all the animals described in the fourth count, except the first one that Charles and Mitchell admitted was stolen and received and branded by them, for the reason they are in a measure duplicates; for instance, the first animal they admit having received and branded was also charged to be a cow, the District Attorney apparently not being sure of the sex of the animal; and with reference to the Cobelle steer there is no sufficient proof that this particular animal charged in the indictment—there was testimony of a Cobelle steer, but not that it was a steer branded NC as charged in the indictment; so the court will say to you that the only animal upon which you are to pass upon the guilt or innocence of the defendants in the fourth count is the first one described herein. There is some *other* evidence, upon review of it at the noon hour, the Court has concluded to withdraw from you, and that is all evidence that the cow branded JT of Joe Tatsy, the steer P Diamond of Old Rock, the cow



HM of Henry Marceau, the steer ER of Eagle, the cow MF of Frank Monroe, the steer E2 of Young Running Crane, the cow DC of Double Cloth; the testimony in reference to these is all withdrawn from your consideration, and you will disregard it, and for this reason; it was proper enough as it was introduced, because the expectation was that the evidence would go further and show that it came into the hands of these defendants from someone who had stolen it. The evidence was conclusive enough that the property was stolen, but there was no evidence how it got into these defendants hands. Now if these defendants were on trial for stealing stock, the evidence that they had in their possession other stolen stock might be permitted to raise an inference that they had stolen it; but they are not here charged with stealing stock, but with receiving stolen property, and before the evidence of other stolen stock in their possession can be received and considered by you, from which to draw inference of their knowledge, there must be some proof that it was stolen by someone else other than the defendants; but there is no evidence of that kind here.”

We think there can be little question that the admission of such testimony was error and the only question that now remains concerning it, is whether or not its withdrawal by the Court from the consideration of the jury, cured the error.

The rule seems to be well settled in the federal courts, at least as to when incompetent evidence can



be withdrawn and the error cured by its withdrawal and likewise when the reception of such incompetent evidence can be rendered harmless when it is withdrawn from the consideration of the jury. It depends upon the character of it, whether or not the incompetent evidence submitted was of such a character that its reception would likely prejudice the minds of the jury against the defendant, notwithstanding its withdrawal by the Court. If the evidence is of such character, then the error of its admission is not cured by its withdrawal. We submit that it cannot be successfully controverted, that the reception of this evidence unquestionably greatly prejudiced the defendant, and that its withdrawal by the Court from the consideration of the jury, could not in the very nature of things remove the impression from their minds, which its reception occasioned.

The Supreme Court of the United States, in the case of *Throckmorton v. Holt*, 180 U. S. 567, says:

“The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury, by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. \* \* \* But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission,

"State vs. Rees, 40 Mont. 579;  
Drury v. Ter. 60 Pac. 101;  
People vs. Rodrrrodrigues, 134 Cal. 140;  
66 Pac. 174."  
State vs. Rees, 40 Mont. 579;  
107 Pac. 893.

and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614. *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. ed. 453, 459, 15 Sup. Ct. Rep. 383.”

*Hopt v. Utah*, 120 U. S. 430;

*Waldron v. Waldron*, 156 U. S. 38.

### BOSTWICK WAS AN ACCOMPLICE.

If the plaintiff in error were guilty, Bostwick was an accomplice. Speaking of accomplices, it is said:

“His testimony, however, like that of all other accomplices, is to be scrupulously weighed and upon it, if uncorroborated, a conviction should not be permitted to arise. A bare possession of the stolen property is not a sufficient corroboration.”

Wharton’s *Crim. L.* 11th ed. page 1446.

The defendants requested the Court to charge the jury as to the law of an accomplice, record 140, requested instruction No. vii. This the Court refused to do and error was assigned in consequence thereof. The Court did, however, tell the jury, record 165, that:

“If the defendants knew he was selling them stolen stock, then he would be an accomplice of theirs. That would lead you, of course, to give Bostwick’s testimony serious consideration; scan it very carefully. You should do that anyhow because

he has been convicted of stealing this stock, and you take that into consideration in weighing his evidence.”

But the Court, nowhere in the instructions, tells the jury that the evidence of an accomplice must be corroborated, or that if they found Bostwick was an accomplice, that it was necessary that his testimony should be corroborated before a conviction could be had.

In the court below, it was contended that the testimony of an accomplice did not have to be corroborated in the federal court, and that the rule of state courts in this respect did not apply. The trial judge seems to have taken this view of the law. The rule, however, is the same in the federal courts as in the state courts.

“No conviction should be had on the uncorroborated testimony of an accomplice.” 1 Ency. of U. S. Sup. Ct. Rep., title “Accomplices.”

It is the duty of the Court to instruct the jury, and especially when requested, that the uncorroborated testimony of an accomplice is insufficient to convict. *Grim v. United States*, 156 U. S. 604; *Reagan v. United States*, 157 U. S. 301.

*“Reg. vs. Faler, 34 Eng. C. L. 314.”*

## INSTRUCTIONS OF THE COURT.

### GUILTY KNOWLEDGE.

Sec. 288, of the Criminal Code of the United States, in force January 1, 1910, is the statute under which plaintiff in error was prosecuted. It reads:

“Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, *knowing* the same to have been so taken, stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than three years; and such person may be tried either before or after the conviction of the principal offender.”

The charge in the indictment is that defendant did “feloniously buy and receive,” the cattle “knowing the same to have been so feloniously stolen, taken and carried away.” It is thus observed that the indictment does not charge concealment of the property in question but only charges the felonious buying and receiving.

The Court instructed the jury at great length as to what constitutes guilty knowledge under Sec. 288, *supra*. For example, at the bottom of page 150 of the record, the jury are told:

“You will observe that the law involved requires that before a party can be convicted of buying or receiving stolen property, he must have knowledge



that the property he is buying or receiving, was stolen. Now the fact that he has this knowledge need not be shown by direct thestimony, *nor is it essential* that the accused have *actual or positive knowledge* such as one acquires by personal observation of the fact; that is to say, it is not necesssary that he who buys should see the thief taking the property, nor is it necessary that the thief should tell him he stole the property, but if the circumstances and conditions surrounding the purchase, and the nature of the property and all are such that it can be inferred by you, *as reaosnable men, that the defendant had knowledge, you have a right to draw that inference. You may infer such knowledge from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that the property was stolen.*”

Rec. bottom page 150 and top 151

And again, following this on the same page, 151, the jury are told, in effect, that actual knowledge of the larceny is not necessary but “that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, *that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of countervailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief.*”

Rec. 151.

Likewise again at the top of page 152 of the

record, the same doctrine as to the character of knowledge that the statute requires is again stated by the Court, wherein the jury are told that “If the *facts and circumstances* surrounding the defendants’ receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an enquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge.”

And following this instruction, the jury are told, in effect, that suspicion or suspecting the property was stolen, “and he makes no enquiry or no investigation, because he fears he would find out the truth,” then that he is as guilty as if he had actually discovered and learned that the property had been stolen.” In this instruction, the jury are told, “*he is charged with what he knows or what he is put upon enquiry to know.*”

Following this, and on the same page, the Court continues with the elucidation of this doctrine, which we insist is wholly erroneous, and the jury are again told that circumstances, sufficient to put defendants on inquiry, must be considered, and if these circumstances exist and the defendant did make the inquiry, he is held to have possessed that knowledge required by the statute for the enquiry, had it been made, would have resulted in his learning that the

cattle had been stolen.

Throughout the lengthy instructions of the Court to the jury on this question of guilty knowledge, the Court was extremely careful to constantly keep before the jury his interpretation of this statute as to what was meant by having knowledge of the fact that the property had been stolen. This is shown in the instructions found at the bottom of page 153 and the top of page 154 of the record, wherein the jury are told, “knew the property was stolen, knew, as I have heretofore indicated to you, *not necessarily the actual knowledge*, but such knowledge as would put a reasonable man upon enquiry from which he could ascertain the truth.”

And again on page 154, in telling the jury what it was necessary for the prosecution to show before a conviction would be had, the jury are told:

“Third, that one or more received and retained the property described, of the property of the indictment with *knowledge, belief or reasonable suspicion, that he failed to investigate for fear he would learn the truth that the same had been stolen.*”

The twenty-sixth specification of error, brief page 13, requested the Court to charge as follows:

“The Court instructs the jury that before you can convict any of the defendant, you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the in-

dictment or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.”

The Court refused to give this instruction as requested, which, we insist, is clearly the law, but modified the same by inserting after the word “knowledge” in the third line of the third subdivision of said requested instruction, the following, “belief or reasonable suspicion which he failed to investigate for fear he would learn the truth.”

Following this instruction, record bottom page 154 and top of page 155, the jury are again told that, if at the time when the defendants purchased and received the cattle, if they “believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them.”

Here, if your Honors please, is a positive and



emphatic instruction to the jury, that suspicion that the cattle had been stolen, is all that is necessary to a conviction, and that too, in the face of a statute which contains no such language or anything like it, but, on the contrary, contains the plain, clear, emphatic and unambiguous term “knowing.”

The Court in this instruction, which was objected to, like all the rest similar to it, gives to this statute a meaning it will not bear by any rules of statutory or grammatical construction, we have been able to discover. If Congress, in the enactment of this statute, had intended that suspicion or even “reasonable suspicion,” as the Court says, whatever that maybe, should be the law of the land upon this subject, of course it would have so declared. The lower court gave a meaning to this statute wholly unwarranted by any language found in it. “To know,” is to perceive or apprehend, clearly or certainly; to understand; to have fully information of, or to be convinced of the truth of a thing. (Webster’s International Dictionary). The Century Dictionary defines “knowing” as follows: to have a clear and certain perception or apprehension of, as a truth or fact. How it was possible for the Court to confound suspicion with knowledge in such a statute as this, I confess I am unable to discover.

Again, the same error is repeated once more near the top of page 156 of the record, where the same identical language is used, and the jury are



told that if the defendants, “purchased the property in good faith, without knowledge or belief, or reasonable suspicion which they failed to investigate for fear of discovering the truth,” that was sufficient.

And further on in the same paragraph, in the same instruction, we have the language “reasonably suspecting, as before stated.”

We submit that all the foregoing instructions were in the very teeth of the statute and were most highly prejudicial to the defendant. Exceptions are reserved to such instructions.

In considering this assignment of error, and the decisions which will be canvassed in relation thereto, all the facts and circumstances surrounding and accompanying the buying, branding and receiving of the animals in question must be duly considered, for the reason that they, themselves, become potent evidence upon the sole and vital question in the case at bar, viz., that of scienter. In cases where a conviction has been upheld for buying and receiving stolen property knowing it to have been stolen, one or more of the following evidential circumstances were proven:

1. A grossly inadequate price paid for the stolen property.
2. Secrecy in its purchase and concealing the property.
3. Denial of its purchase.
4. Attempting to dispose of the property after

its purchase and particularly for an inadequate price.

5. Bad reputation of the seller, and particularly with reference to his having previously disposed of stolen property and that the defendant had knowledge of the same.

All these are elements or circumstances, and perhaps there are others, which accompany and attend the buying and receiving of stolen property knowing it to have been stolen, and when one or more of these circumstances are proven on the trial it becomes competent evidence tending to show guilty knowledge. Not that it may be always sufficient to convict, but it is, to a greater or less degree, at least incriminatory. In the case at bar, if the Court please, not a single one of these elements or circumstances is present. Not one of them was proven or even attempted to be proven on the trial. On the contrary, all the evidence shows that a full and fair price was paid for every head of cattle that the defendants purchased from Bostwick. Even Bostwick himself, the star witness for the prosecution, emphatically so testifies. The Court, in the instructions, very fairly told the jury that the court thought it must be held, under the evidence, that a fair price was paid, which was thirty dollars a head, Rec. 157 and bottom of 159. If, indeed, this were not a fair price, then the Indian Agent, Joe Brown, the Stock Inspector, Buck and many others, who testified and were familiar with the animals,

and their value would, undoubtedly, have contradicted the testimony of Bostwick. The evidence is, therefore, conclusive that a fair price was paid. As to their manner of purchase, all the evidence on the part of the Government shows that every head of these cattle was purchased and branded in broad daylight and treated and handled precisely as defendants' own stock and precisely the same as stock which they bought and which was straight. The Government's own witnesses, Rec. 59, testified that there was nothing to arouse suspicion concerning the branding of these cattle. Nor was there any pretense that there was any concealment about the purchase at all, nor any denial of the transaction. The defendants always admitted the purchase and the branding and reception of the cattle. Neither did they attempt to sell them at any price or to do a single act in relation to them different from their own cattle which had, confessedly, been legitimately purchased. Again, the reputation of Bostwick prior to these transactions, so far as known by the plaintiff in error, was good. He had been in the cattle business, buying and selling cattle, and, as he himself tells us, had never had any trouble before, Rec. 103. He had money in the First National Bank at Kalispell on which he checked in payment of stock, and that so far as any prior conduct upon the part of Bostwick is concerned, at least so far as this record discloses, his reputation was just as good as that of any other man on the Reservation or

anywhere else. We submit to the Court, in considering the instructions so far as they relate to the question of knowledge upon the part of this defendants, we should bear in mind the evidence upon these points. Moreover, this plaintiff in error is an Indian, a ward of the Government of the United States, a young man, who, presumably, has spent all his life among the Indians and on an Indian Reservation. It is common knowledge that the mode and habits of life of these Indians, and of their intercourse and dealings with each other, ought not to be gauged the same way as that of a white man living in a civilized state. The plaintiff in error was dealing with the Indian Bostwick, whom he had known for a long time and who was friendly with the defendant and his family.

Having now referred to the facts and circumstances which attend and accompany cases of this kind, where a conviction is upheld, we now invite the attention of your Honors to the decisions.

In the case of the State vs. Rountree, reported in 61 S. E. 1072, and also in 22 L. R. A. N. S. 833, it is said:

“We proceed to consider the question presented by the following exception: ‘that his Honor erred in charging the jury that guilty knowledge may be constructive, ‘as when the circumstances are such as would put a person upon such inquiry, as, by a reasonable pursuit of that inquiry, the actual facts would have been discovered. Because the law



requires a man, when put upon notice of facts so that, by pursuit of the inquiry with reasonable diligence such as a man with reasonable diligence would carry on, he would ascertain the facts, the law affixes the true facts upon him, because it requires him to pursue his notice with that degree of diligence which a man of ordinary prudence would pursue, and, if you are satisfied from the testimony that a man of reasonable prudence should have pursued the inquiry, and would have pursued the inquiry, and by that pursuit would have discovered the true facts, then the law affixes that knowledge upon him, as well as if he had actual knowledge.’ Whereas, there was no evidence of notice upon which the defendants were put on inquiry, and this was an enlargement of a statute which holds a party guilty who buys stolen goods knowing them to be stolen at the time, and not what defendants might have ascertained by inquiry thereafter, or before said purchase. And his Honor’s charge was of an equitable principle, which could not be made effective in assisting the enforcement of a criminal suit.”

The court then proceeds to quote the criminal law as to receiving stolen property, which is in substance the same as that under which the plaintiff in error was convicted, and then proceeds:

“There is no doubt as to the well settled rule in civil actions that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry is equivalent to notice, but such is not the rule in



cases arising under the foregoing section of the Criminal Code. As stated by the Court in the case of *State v. Crawford*, 39 S. C. 343, 17 S. E. 799:

‘It is necessary that the guilty knowledge should be alleged, as well as the fraudulent intent.’ It cannot be successfully contended that a mere inadvertent failure to pursue an inquiry with reasonable diligence is the equivalent of guilty knowledge and a fraudulent intent, which are essential elements of the crime, as otherwise a person could be punished under the statute for negligence unaccompanied with intentional wrong. Knowledge of the theft on the part of the receiver is an essential element of the offense, and such knowledge must exist at the moment the property is received.”

For the error in this instruction the judgment of the trial court was reversed and the case remanded for a new trial.

In the case of *State vs. Denny*, 117 N. W. 869, the following instruction was held erroneous:

“Guilty knowledge is made out, and sufficiently proven to warrant a conviction in that respect, by the proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen.”

The court held that the standard by which guilty knowledge may be imputed should not be that of a man of ordinary caution and intelligence but an individual test of the defendant.

In *Pickering vs. United States*, 101 Pac. 123, an instruction to the jury to find for the State if the defendant received the property with knowledge that it had been stolen, or under such facts or circumstances as would cause a reasonably prudent man to believe it had been stolen,—that is to say, under such circumstances as would put a reasonably prudent man upon inquiry before taking the property, was held error.

So likewise the following instruction was held erroneous in the case of *State vs. Daniels*, 61 S. E. 1073.

“Where a person has knowledge of facts, or has *suspensions* that would induce a person of ordinary prudence to make an inquiry, then he is required to do so. If he fails to do so, he is as much bound by what may be the state of facts as if he had been informed as to what they were. If the defendant had notice of facts that would put him on inquiry he is bound to pursue those facts, and, if he fails to do so, it is at his own risk.” That is just what the jury were told in this case. See also *Miner vs. State*, 45 So. 318.

*Sanford vs. State*, 61 S. E. 741.

In the case of *State vs. Goldman*, 65 N. J. L. 394, 47 Atl. 641, the judgment of conviction was reversed where the jury was instructed as follows:

“That which a man ought to have suspected, in the position of the defendant, he should have suspected, and he must be regarded as having

suspected, in order to put himself upon his guard and upon inquiry.”

Of course the mere possession of stolen goods without proof that the accused received them with guilty knowledge, arouses no presumption against the defendant, and is insufficient to establish guilty knowledge.

Territory vs. Claypool, 71 Pac. 463.

Toliver vs. State, 8 S. W. 806.

Before a conviction can be upheld under indictment for receiving stolen property knowing it to have been stolen, knowledge of that fact must be established beyond a reasonable doubt.

Stripland vs. State, 40 S. E. 993.

May vs. People, 60 Ills. 119.

Gordon vs. Minn., 117 N. W. 483.

State vs. Daniels, 61 S. E. 1073.

In the case of Kirby vs. United States, 174 U. S. 47, the lower court instructed the jury as follows:

“Now, upon the question of whether the defendant knew that it was stolen property, you will, of course consider all the evidence in the case. You have a right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have a right to infer that he did know. Now, if a person received property under such circumstances that would satisfy a man of

ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen.

The judgment in this case was reversed.

“We said in *May vs. People*, 60 Ill. 119; ‘In order to a conviction it was necessary for the prosecution to satisfy the jury, beyond a reasonable doubt, that the accused knew the goods had been stolen at the time he received them’ and in *Aldrich vs. People*, 101 Ill. 16 ‘guilty knowledge on the part of the defendant is essential to the constitution of the offense.’

“It is true that proof of direct knowledge is not necessary, and that evidence of facts and circumstances sufficient to create in the mind of the accused a belief that the goods were stolen, may amount to guilty knowledge of the fact (*Huggins vs. People*, 135 Ill. 245, 25 N. E. 1002, 25 Am. St. 357) but this instruction goes further, and tells the jury, first, that knowledge is not necessary, nor even belief, on the part of the defendants, if the evidence be sufficient to induce a person of ordinary observation of belief.”

*Cohn vs. People*, 197 Ill. 482; 64 N. E. 306.

The instruction in that case, and which the Supreme Court of Illinois held to be erroneous and

reversed the case, is as follows:

“It is not necessary to the conviction of defendant or defendants that the people should show that the defendant or defendants saw the goods stolen, or was told that they had been stolen, *or had absolute knowledge* that they were stolen goods. If it appears by the evidence that circumstances presented and manifest to the defendant or defendants at the time of the reception of the goods in question (if you believe from the evidence that the defendants received the same) were such as to have induced them and any man of ordinary observation *to believe* that the property was stolen and was being offered for sale to the defendant or defendants by one who had no right so to do, that is sufficient.”

We confidently submit that, under the foregoing authorities the defendant is entitled to a new trial under the instructions of the court.

Justice Harlan, speaking for the Supreme Court of the United States, says:

“It was incumbent upon the Government, in order to sustain its charge against Kirby, to establish beyond a reasonable doubt, (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession with intent to convert it to his own use or gain; (3) that he received or retained it with *knowledge* that it had been stolen from the United States.”



Kirby vs. U. S., 174 U. S. 53.

What makes these instructions all the more objectionable and harmful is the fact that not a single element or circumstance which attends and accompanies the buying and receiving of stolen property, knowing it to be stolen, was present or attended the buying and receiving of these animals from Bostwick. The record shows that Bostwick had never been in trouble before and that his reputation as an honest and trustworthy stock buyer and seller was good and that none of the Petersons had the least occasion to suspect his honesty in the transaction. These features of the case will be more fully considered when we come to consider the question of the insufficiency of the evidence. We now simply call the Court's attention to them in order to emphasize the error of the instructions complained of. Of course, had defendants denied the buying and receiving of the cattle, had they purchased at a grossly inadequate price and received them secretly, or had concealed or attempted to conceal their possession of them, or had done a single thing or failed to do a single thing which characterizes the conduct of the criminal in such cases, then it might become a debatable question as to how far a court might, with propriety, go in instructing a jury as to what extent such circumstances prove guilty knowledge on the part of the receiver of stolen property. We respectfully insist that all of these instructions, as to guilty knowledge, based upon the record in this

case, are wholly and entirely erroneous, and that the giving of them constitutes reversible error.

No such instructions as these, or any like them, have ever been approved or upheld in any appellate court so far as we are able to discover. On the contrary, the giving of them, as shown, constitutes reversible error in every case.

Again, knowledge that the property was stolen must be proven beyond a reasonable doubt.

See exhaustive note to *State vs. Rountree*,  
supra, 22 L. R. A. N. S. 833-841.

See also *Coffin vs. U. S.*, 156 U. S. 432;

*Rosen vs. U. S.*, 161 U. S. 29;

*Roscoe's Criminal Evidence*, 6th Ed. 178-420.

Upon this branch of the case, we take it, there can be little question that the court erred in giving these instructions and a new trial should be granted on this ground.

#### REMARKS OF THE COURT.

The record of this assignment is contained in defendant's bill of exceptions No. 2, Rec. 174-177. This bill shows that the jury could not agree after they had remained out all night; that on the following day they returned into court and reported that they were unable to agree except as to the defendant, Walter Peterson. Whereupon the court declined to receive a verdict as to one defendant and then proceeded, of its own motion, to give the jury further instructions in which this matter excepted

to occurs. We understand the rule to be that a Federal Judge may comment upon the evidence, which a judge may not do in a state court, providing the jury are instructed, at the time, that they are not bound by the opinion of the court as to what the facts are. But that the instructions and comments of the Court must be confined to the evidence in the case, and that to instruct a jury, as to matters not in evidence, such as the expenses of a former trial, the expenses of the present trial, or what the probable expense would be in the future, in case of a disagreement, are matters outside of the power of the Court. In this case, as the bill shows, and as the fact is, within less than an hour after the Court had remarked to the jury upon the very heavy cost of this prosecution, and that both parties had a right to have it determined for the purpose of saving expense, and that there was no more probability that a jury in the future would be more likely to agree than this one, the jury returned a verdict of guilty against the plaintiff in error in less than one hour, Rec. 176-177. We submit, that under this record, that the above remarks of the Court manifestly induced a verdict of guilty against the plaintiff in error and that but for such remarks, he would never have been convicted.

The solemn oath a juror takes when sworn to try a case according to the law and the testimony does not permit him, even to consider for a moment the cost of the litigation. Indeed, it would be

a violation of his oath did a juror allow such considerations to influence his verdict. For the length of the trial, the cost thereof and all kindred matters, the jury are not responsible. They, as said, can properly consider, in making up their verdict, only the testimony in the case and the instructions of the Court. Now, those remarks of the Court, as to the enormous cost to the parties of this litigation, *was not an instruction as to the law of the case*, and, hence, like an expression of opinion by the Court as to the guilt or innocence of a defendant, was not binding on the jury. Moreover, such remarks, we respectfully insist, strongly tend to influence jurors to disregard their oath and to, *in fact*, consider foreign and extraneous matters, in making up their verdict, the very thing the jury has sworn it would not do. How greatly defendant was prejudiced by such remarks, the record clearly, if not indeed, conclusively, shows. At any rate it is indisputable that no Court can say, under this record, that these objectional remarks of the Court did not cause the conviction of plaintiff in error, and that had they never been made that he would not have been convicted. The inevitable, logical result of such a practice as permitting nisi prius judges to instruct juries or remark to them, when a disagreement is reported, upon the great cost of the case, etc., is to substitute cost of litigation for testimony in determining the life or liberty of a person accused of crime. Such practice, we insist, is not



due process of law. It is a violation of every safeguard the Constitution has placed around a defendant accused of crime. It is not only mischievous and dangerous, but it is subversive, even, of the right of trial by jury. It should not receive the approval of the courts. Such a practice is fraught with too many and too great dangers to be upheld.

### INSUFFICIENCY OF THE EVIDENCE.

In what has already been said, much has appeared showing wherein the evidence is insufficient to justify a conviction in this case. It has been shown that the suspicious or incriminatory circumstances which accompany and attend the buying and receiving of stolen property, knowing it to have been stolen, are utterly wanting. We briefly recapitulate the testimony, such as it is, that can, in any manner, be construed as having any bearing upon the case.

Joe Brown, the Indian Stock Inspector, testified that in October, 1910, the Indian Agent McFatridge, instructed him to take some men and gather up all the Peterson cattle, bearing their brand and which also had another brand.

Rec. 30 and 45

They gathered up some 67 head of such cattle and brought them to the corral at Browning. Among the number were found the 4 head described in Count I of the indictment, which was the only count upon which defendant was convicted.



Rec. 37-39.

The cattle had the brand of defendant on them, Lazy U Lazy J, on the right ribs.

Rec. 39.

The men did not bring in all the cattle bearing another brand beside the Peterson brand. The inspector says that he found 20 or more of such cattle which he was satisfied were all right.

Rec. 45.

The inspector further testifies that he knew the Petersons were buying and selling cattle and that it was nothing strange to find their cattle with other brands on them beside their own.

Rec. 46.

Ten of the 67 head, which were brought into the corral, were at once turned out on the range as it was discovered they were all right.

Rec. 46.

The Indians, also, who had sold cattle to the Petersons, came to the corral and said that they had sold them and had received their money for them and that everything was all right.

Rec. 47.

In addition to this, a lot more of the cattle which were brought in, were found to be all right as the record shows that the agent, who sold all of the cattle, turned back to the Petersons \$250.00, or more in money that he had received for the sale of Peterson cattle.

Rec. 47.

Arthur E. McFatridge, the Indian Agent, identified Gov. Ex. "A," purporting to be an affidavit of the plaintiff in error and his two brothers, Oscar and Walter, which affidavit states that "the list named herein are all the cattle purchased by us from the said John Bostwick." The affidavit contains a list of cattle with other brands. The witness was unable to state which one of the affiants read the affidavit, or whether or not Mitchell Peterson read it at all. He does state, "there were no cattle in this bunch bearing the brand of Oscar Peterson. I don't know if Oscar Peterson ever bought a single head of cattle in his life."

Rec. 50, 51, 52-53.

Yet Oscar signed the affidavit as well as Mitchell and Walter. There had been talk of the prosecuting of Bostwick before the affidavit was signed.

Rec. 51.

The agent further tells us that he "knew Peterson was quite a stockman," and "I knew at the time that he had bought cattle of Indians," and that "it is the custom among Indians, in common with that of stockmen, when buying from the Indians, to vent the brand and put their own brand on."

Rec. 54.

He further testifies, "out of this bunch that was brought in, some Indians came down there and stated that they had sold such animals to the Peter-

sons," and that he sold a number of head of these cattle and paid the money received for them to the Petersons.

Rec. 55-56.

Levi Burd, another witness for the Government, testifies that about October 21, 1910, he was at the Peterson Ranch when they were branding, but he saw nothing suspicious as everything was being done in the usual manner and "was out in broad daylight."

Rec. 57-59.

Old Rock merely identified his brand, which was not found on any of the animals described in the indictment.

Rec. 62-63.

Of what possible evidentiary value is the testimony of Old Rock, and a host of kindred witnesses, we are unable to see.

Dave Pambrum testified to his owning the T anchor P brand and which is not one of the brands described in the indictment. He went to the agency about the first of November, 1910, and saw some of his cattle there in the Government corral. Among the number was a yearling steer with his brand on it together with another brand, and that he had never given permission to anyone to put the other brand on the animal or to drive it from the range; when the animal first got away, he didn't pay any attention to it. This was about August, 1910.

Rec. 65-67.

Henry Marceau gives us similar testimony. His brand is HM, not one of the brands described in the indictment. There is this difference in the testimony of Marceau:

Q. "Did you ever tell anyone that they could drive this cow off from your place on the range where it was running?

A. Yes, sir.

Q. Who did you tell he could drive it away?

A. I spoke to a fellow about the cow and he told me he drove the cow away from the range and I asked him why he drove the cow away."

Rec. 69.

He further says that all he knows about the case is that he went down to the Agency, having missed this HM animal, and found it there and got the money for it and that he didn't lose anything.

Rec. 70.

Of like character is the testimony of Brocky and Eagle, record 70. Neither of their brands are found in the indictment in this case.

Young Running Crane identified his brand as an E2 on the right shoulder, not one of the brands described in the indictment. This brand nor none of these others were on any of the cattle described in the indictment in this case.

Rec. 71-72.

Of like character is the testimony of Double Cloth, record 72, and also that of Dick Kipp, record 73-74, as likewise the testimony of Louis Monroe,

record 74-75, and Frank Monroe, record 75-76. None of the brands of these witnesses appear upon the animals described in the indictment.

Joe Tatsey likewise gives similar testimony. His brand is JT on the left shoulder, not one of the brands described in the indictment.

Rec. 77.

Of the same character and tenor is the testimony of Phillip Flat Tail.

Rec. 78-79.

This count was dismissed at the former trial, but the court allowed everything to go in, regardless of whether the count had been dismissed or not.

None of these witnesses, in any manner or form, even remotely, tend to prove the charge that the plaintiff in error brought and received any one of the four animals described in the first Count of the indictment, knowing them to be stolen. Evidently they were put upon the stand for the purpose of prejudicing the plaintiff in error and of influencing the jury.

Albert Goss, was one of the men who assisted Joe Brown, the Stock Inspector, in rounding up the cattle.

Rec. 79.

On the bottom of page 81 of the record, the witness testifies regarding the time when he came to the Peterson ranch as follows:

“I rode down there in the day time and found Melvin Peterson and the other Peterson boys there,



all three, Mitchell and Walter, they were working cattle out in the field, some of the very cattle I took over. It was broad daylight and the field was in plain sight of the road, anybody could see it. I don't know that they were trying to hide anything in that field."

Rec. 81.

Matt Lytle was likewise one of the men who helped to corral the cattle and he gives us substanti-ally the same testimony as Albert Goss.

Rec. 82-86.

### *JOHN BOSTWICK.*

This witness was the star witness for the prosecution, a self-confessed thief, who, at the first trial, came from the county jail where he was serving time, to testify for the Government. Without his testimony, the Government would have no standing whatever in Court, and with it, we respectfully insist, since he is an accomplice of the plaintiff in error, if the theory of the Government is correct, that they still have no standing in Court, for the reason that his testimony is not corroborated.

Bostwick testifies that he worked for the Petersons during September and October, 1910, on the roundup; he sold Mitchell Peterson four head of cattle about the 4th of July, 1910, for which he was paid \$120 or \$30 a head.

Rec. 87.

The four head were picked up by Bostwick on

the Roundup but he doesn't remember the brands of any of them.

Rec. 88, top of page.

It was claimed by the District Attorney that these four head of cattle are the cattle described in Count 4 of the indictment.

Rec. 87.

This witness testifies that "this Bryan Connelly steer was picked up on the roundup two or three months afterwards." That is, the Bryan Connelly steer described in the fourth Count of the indictment, was picked up by Bostwick two or three months after the sale in July, 1910, of the first bunch of four head.

Some of the cattle sold by Bostwick to the Petersons, were stolen while others were not.

Rec. 93.

This witness further tells us that he never had any understanding with the plaintiff in error about his buying cattle from him, that nothing was every said about it and that he never told him where he got the cattle.

Rec. top page 101.

On cross-examination, Bostwick tells that he had never stolen any stock before, although he had dealt in stock; that he had never been accused of or arrested for stock stealing before; that at the times mentioned by Mr. Freeman, the District Attorney, in his examination, "I had deposits in the Kalispell National Bank and I issued checks on that bank."

Rec. 103.

He further testifies on the same page, that “I bought cattle of Miles Running Wolf and paid for them. I had no permit for that nor did I give any bill of sale for that, I got the animal in a trade. I sold it to Mitchell Peterson and I didn’t give him any bill of sale and he didn’t ask me for any. This deal was perfectly straight and honest. There were a number of other cattle the same way.”

Rec. bottom page 103.

On page 104 of the record, this witness testifies as follows:

“Q. Was the transaction any different as to these that were straight than those that were not?

A. No sir.

Q. Was there anything in the transaction as far as you know that would lead Charles Peterson to suspect that any of these others were stolen any more than the Miles Running Wolf or others that were straight?

A. No sir.

“With reference to Walter it was the same and with reference to Mitchell it was the same, except the blackjack game steer.”

Rec. 104.

The witness further goes on to state that he sold four several bunches of cattle to the Petersons at four different times; that he sold cattle before the times mentioned by the District Attorney, to different people; among the number to whom he

had sold cattle was a man by the name of Wetzel and also to Levi Burd, and he had bought cattle from him and never had any trouble about them, and this was before the Peterson cattle transactions.

Rec. 104.

He further says, bottom page 104 and top of page 105, "there were also a number of others with whom I had business transactions of that kind, before I had these transactions with the Petersons. I never had any trouble at all about them. Nobody made any complaint so far as I know." The first bunch of cattle sold to the Petersons was a bunch of four head of two year old steers, sold at Browning, about the first of July, 1910, for \$30 a head or \$120 for the four. The witness says positively that "that was a fair price for the cattle. So far as Mitchell Peterson knew that transaction was just as straight as the one with reference to the Miles Running Wolf animal. There was nothing said or done by me to put Mitchell on his guard as to the animals."

Rec. 105.

The second sale was about the 30th of August, 1910, of seven head of all ages, cows and steers. For these, he received the same price of \$30 a head as shown by the checks in evidence. "That was a fair price for those cattle." This bunch of seven head the witness assisted in delivering at the ranch. "They were branded in broad daylight,

only about one-half a mile from the agent's office, where anybody could see us. There was no concealment about the branding. \* \* \* The cattle were in the corral right near the public highway, where everybody could have seen them if they noticed the place and anybody passing there could see the cattle. There was no attempt to conceal them on the part of the Petersons, everything was done in the broad daylight."

"I was paid in full and that transaction was closed. The amount paid, \$210, I say is a fair price."

Rec. 106.

The third bunch consisted of 16 or 17 head, and Bostwick says he was paid \$500 for that bunch, which "was a fair price." I received in payment two \$175 checks which I have identified."

Rec. bottom page 106.

Full settlement was made, and a satisfactory one.

Rec. 107.

The fourth, and last bunch, was sold about the 20th of October, 1910, and consisted of six or seven head. This bunch was got out of the Burd field. The witness says that the price was \$215, for this bunch, which was all they were worth and that he was paid in full for them, which was the contract price outside of the blackjack steer.

Rec. 107.

"Q. Because you let that go to square that



debt of Mitchell's?

A. Yes.

Q. Taking that into consideration the settlement was made in full and on the square for all the four different bunches?

A. Yes sir.

Q. They didn't owe you a cent?

A. No."

Rec. 108.

The witness then proceeds to tell us that the roundup in Burd's field was the customary and usual roundup at which all the stockmen participated; that as a stockman, he is familiar with the methods pursued when a person buys cattle of another with a different brand than his own. The purchaser vents the old brand, and then the witness is asked this question:

"Q. Was there any difference in the handling of this stock that was stolen and which you sold to the Petersons, and that which you honestly bought and paid for and sold to the Petersons, as to the venting and branding of the cattle?"

"A. No sir."

Rec. 108-109.

Following this, the witness says:

"The old brand on the cattle was not blotched or tried to be disfigured in any way. The new was put on where anybody could see it. The old brand was apparently plain to be seen, it was just the same after the rebranding as before."

Rec. 109.

The witness then tells us that these cattle, were put into the Burd field “so that the people who owned them could come and get them.”

Rec. 110.

On the top of page 111, he says:

“My object in going down there was to cut out the Peterson cattle.

“Q. That was perfectly straight, wasn't it?

“A. Yes sir.”

On page 112, the witness is asked the following question:

“Q. There was nothing crooked about this business in the Burd field?

“A. No sir.”

*The T Anchor P Steer.*

This animal deserves a caption by itself for the reason that it is the only animal that the star witness for the prosecution, testifies to, as having put plaintiff in error wise to the fact that Bostwick stole it.

Before considering this animal, it should be borne in mind that it is not one charged in any one of the four counts in the indictment.

On page 113 of the record, appears the following, relating to the time when Bostwick, as he claimed, put Mitchell wise to the fact that the T anchor steer was stolen.

“Q. Up to that time, Mr. Bostwick, if I understand you, everything was on the square between

you and the Petersons as to the stock business?

“A. Yes sir.

“Q. Previous to that time you had not indicated anything to them or to Mitchell or anybody else that you had stolen stock or was going to?

“A. No, not that I remember of.”

Following this, he says:

“Up to the last bunch of six head or seven whichever it was, I never told Walter Peterson nor Charles Peterson that any of them were not right,” and that the only person, he ever before told, was Mitchell Peterson.

He then says this: “It is a fact that out of the last bunch there were only one head that I told him wasn’t straight, that one being the T anchor P steer.”

Rec. 113.

It would seem from the Bostwick story that the T anchor P steer was in the Burd field with the other cattle and that it had a very dim brand on it and Bostwick called Melvin Peterson’s attention to it; that they couldn’t make out the brand; that as they were driving the cattle along someone asked, who owned this steer and Bostwick said he did and that Mitchell asked him what he wanted for it, to which Bostwick replied that he would take fifteen dollars for him; that then Mitchell inquired of Bostwick as to the brand on the animal and Bostwick told him he didn’t know. They took the animal into the field and roped him and examined him and

saw it was a T anchor P brand; that Mitchell told him they had better leave the animal alone; that the next day in cutting out the herd and branding them that this T anchor P steer was standing on the side and that Bostwick told Mitchell if he wanted to take a chance on him, that it would be all right with him and that he could take him for the \$18 in settlement of the blackjack game. "We took a chance on him and that is how the T anchor P steer came up."

Rec. 114.

Charles Buck, the last witness, testifies that he was present on the roundup when the difficulty came up with reference to the Bryan Connelly steer; that this steer was in the herd and "that Bryan claimed the steer and Mitchell said it was his." The steer was then roped and the brand examined and found to be Connelly's brand, and Bryan took it; that he asked Peterson how the matter came about and he told him he got the steer from John Bostwick and said to him: "Why Bryan, you know I wouldn't steal a steer from you." He further testifies that there was a Joe Cobell steer in that herd with the Peterson Brand on it and that Connelly was looking for the Joe Cobell steer and that this took place about three weeks before the roundup closed.

Rec. 122-123.

Such is the testimony in this record to prove guilty knowledge on the part of the plaintiff in

error beyond a reasonable doubt. We search the testimony from beginning to end in a vain endeavor to find the semblance of a motive for the commission of this alleged crime. The record is as barren upon this important point as it is likewise barren of any proof of suspicious or incriminating circumstances which accompany and attend the buying and receiving ~~for~~<sup>of</sup> stolen property, knowing it to be stolen. What possible reason or motive could plaintiff in error have for paying this one-legged Indian, Bostwick, a full price for these cattle and running the risk of going to the penitentiary, when he or any of his brothers, or his father, even, could go out and rustle them quite as well as Bostwick?

All the circumstances surrounding the buying, receiving and branding of all the animals in the four various bunches, conclusively show, and that too by the Government's own proof that defendants handled this Bostwick stock just the same as any others, and likewise according to the Government's own proof, it was utterly impossible to tell or distinguish between the animals that Bostwick sold to plaintiff in error, and which he had bought and paid for, and those which he stole. Everything was open and above board and a fair price was paid for the animals and there is not a single suspicious circumstance connected with the transaction.

There is not a particle of evidence in this record to show that Mitchell Peterson was ever before accused of a crime much less convicted of one.



So far as the record shows, this is the first offense if any. Before he should be convicted of any offense there ought to be sufficient evidence to support a conviction.

Upon Bostwick, and upon him alone, must the Government rely for a conviction in this case, but Bostwick, being an accomplice, must be corroborated, otherwise the prosecution fails. But there is no corroboration in this record. One of the specifications is that the Court erred in refusing to give defendants' requested instruction No. 23, record 187, and being specification 31 in this brief, which instruction requested the Court to charge the necessity of the testimony of an accomplice being corroborated, before a conviction could be had.

Where with these Indians, all wards of the Government, with the exception of Charles Peterson, the father, living upon an Indian Reservation, it is common knowledge, that the habits, actions and mode of living on the reservations, are entirely different from those of white men, and that we cannot judge them by the same standard that we do white men. They are careless in their habits, in their way of transacting business and to judge them by the standard of ourselves, would be a great injustice. But, even if Mitchell were to be judged by our own standards, even then we submit that the testimony is inherently and fundamentally insufficient to support a conviction, and that the judgment should be reversed upon that ground.

## FAILURE OF RECORD TO AFFIRMATIVELY SHOW ARRAIGNMENT OR PLEA.

The record in this case fails entirely to show, affirmatively, that appellant was either arraigned or pleaded to the indictment. This record shows that he was put upon trial for an infamous crime without any issue whatever being made. The consequence of which is that the judgment pronounced upon him in this case is the merest nullity and the cause should be remanded for another trial with directions that he be arraigned and plead to the indictment.

Great was our surprise when the discovery was made that there was no record whatever of any arraignment or plea. The records of the Clerk of Court were found to be absolutely silent upon the matter. His record showed the arraignment and plea of the four co-defendants, his father and three brothers, but no record of any arraignment or plea as to Mitchell Peterson. Just how this happened to occur is somewhat uncertain and is not within the clear recollection of counsel. Probably, however, the failure to have Mitchell Peterson arraigned or to have him plead to this indictment, was due to the practice or custom, more or less in vogue, of permitting defendants, who were out on bail and at a great distance from the place where the court was held, to be arraigned and plead on the day set for the trial of their case and thus save the great ex-

pense incident to an extra trip to court for the sole purpose of arraignment and plea. If such were the case, then the matter of the arraignment and plea on the day set for his trial, was entirely overlooked and forgotten by everybody. However, it is immaterial just how it happened. The legal effect is precisely the same regardless of the cause.

Since the record, under all the authorities, must affirmatively show that the defendant in a criminal case, was arraigned and did plead to the indictment, it is, of course, absolutely immaterial as a matter of law, what causes operated to produce such a result.

The only thing, if your Honors please, in this entire record, referring to the matter at all, is the mere recital in the judgment of the Court, and after the preliminary parts of the judgment wherein the defendant is informed of the charge against him, in stating what the charge consisted of, the judgment then recites as follows:

“And of his indictment, arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as charged in said count one of said indictment.”

Rec. 16.

Further on on said page 16 of the record, the indictment further recites:

“That whereas, the said defendant, having been duly convicted in this court of the offense of feloniously buying, and receiving certain stolen

cattle," etc.

This is all there is in the record upon the matter. That this naked recital in the judgment that the plaintiff in error was arraigned and pleaded to the indictment, is totally insufficient, will abundantly appear in the authorities hereinafter cited.

This whole question was fully considered by the Supreme Court of the United States, in the case of *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct., 952. In an exhaustive opinion of Mr. Justice Harlan the authorities are fully reviewed and the doctrine is emphatically announced that the record must affirmatively show an arraignment and plea, otherwise there was no issue to try and the judgment is a nullity. We quote from the opinion of Justice Harlan in the *Crain* case, page 636, as follows:

"But an objection is made to the proceedings in the court below, which is of a serious character.

"The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn 'to try the issue joined,' and from the statement in the bill of exceptions that the jury were 'sworn and charged to try the issue joined.' What that issue was is not disclosed by the record.

"The Government does not, in terms, claim that



it was unnecessary for the defendant to plead to the indictment. But it assumes (although the record does not state such to be the fact) that the defendant pleaded not guilty, and contends the omission to record that plea is only a clerical error which did not prejudice his substantial rights.”

“By U. S. Rev. Stat. 1025, it is declared that “no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.”

“Is it a matter of form only whether the accused pleads or does not plead to an indictment for an infamous crime? If it be not a matter of form, then it would seem that if convicted, the fact that the accused did plead should clearly appear from the record, and not be left to mere inference arising from a *general recital* that the jury were sworn to try and did try ‘the issue joined,’ without stating what was such issue. While, as said in *Pointer v. United States*, 151 U. S. 396, 419 (38: 208, 217), all parts of the record are to be interpreted together, so that, if possible, effect be given to all, and a deficiency in one part of it supplied by what appears elsewhere, it was there held that ‘the record of a criminal case must state what will affirmatively show the offense, the steps without



which the sentence cannot be good, and the sentence itself.'

"In capital or other infamous crimes an arraignment has always been regarded as a matter of substance. 'The arraignment of the prisoner,' Lord Coke said, 'is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record.' "

Justice Harlan, quotes from the case of *Grigg v. People*, 31 Mich. 471, as follows:

"An arraignment and plea being imperatively required, the recital of them, if they were taken, was a necessary ingredient of the record.' The judgment was reversed, that the accused might be lawfully arraigned or otherwise dealt with agreeably to law."

Quoting further from the opinion in the *Crain* case:

"In *People v. Corbett*, 28 Cal. 328, 330, it appeared that the defendant, indicted for grand larceny, asked, when brought into court, a separate trial, which was granted; the jury were impaneled; witnesses were introduced by him; the case was argued by his counsel; and the jury, having been charged by the court, returned a verdict of guilty. The supreme court of California said: If the defendant had, at any time anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured

on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury, nor did all of them combined, cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statutory opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case where there has been neither arraignment nor plea is a nullity, and no valid judgment can be rendered thereon.' ”

After citing authorities from the states in general and from leading text writers, the decision then proceeds page 644:

“Without citing other authorities, we think it may be stated to be the prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to ‘try the issue joined.’ ”

In the beginning of this opinion, Justice Har-

lan says:

“The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case.”

The question is not an open one in this court. Subsequent to the decision in the Crain case, this court, in the case of Shelp et al v. United States, 81 Fed. 694, lays down the same rule. Quoting from pages 700 and 701 of the opinion in the Shelp case:

“The record shows that George Cleveland, one of the defendants, waived arraignment, and entered his plea of ‘not guilty’ to the indictment. It does not affirmatively show that Archie Shelp, the other defendant, was ever formally arraigned, or that any plea was ever entered by him to the indictment. The record is silent upon that question. No objection was ever made in the court below, either during the trial, or upon the motion in arrest of judgment, or upon the motion for a new trial, or in the bill of exception, nor is it assigned as error upon the appeal to this court that defendant Shelp was put upon his trial without any plea being entered to the indictment. It is therefore claimed by the United States that the question ought to be considered as having been waived by the defendant. It is, however, admitted that this court can, in a proper case, ‘notice a plain error not assigned’; that a writ of error addresses itself to the record; and that, if the record itself discloses the ground upon which a reversal is sought, there is no necessity for

a bill of exceptions. If the failure to plead is a mere matter of form, and not of substance, the judgment should not be reversed. Rev. St. U. S. 1025. The authorities, however, are to the effect that, while the arraignment may be waived, the plea is absolutely essential. In capital or other infamous crimes, an arraignment and plea has always been regarded as a matter of substance, and must be affirmatively shown by the record. *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952. Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony. *Douglass v. State*, 3 Wis. 820; *Aylesworth v. People*, 65 Ill. 301; *State v. Williams*, 117 Mo. 379, 22 S. W. 1104; *State v. Hubbell*, 55 Mo. App. 262; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 90; *Bowen v. State*, 108, Ind. 411, 9 N. E. 378; *State v. Cunningham*, 94 N. C. 824; 1 Bish. New Cr. Proc. 733, 1354, and authorities there cited."

"The bill of exceptions shows 'that the issue joined in the above stated case between the said parties came on to be tried before the said judge and the jury which was duly impaneled and sworn to try the issues between the said parties.' From this statement in the bill of exceptions it is argued by the Government that this court should infer that a plea of not guilty was in fact entered, and that



the clerk failed to note that fact in the record. We cannot, in the light of the authorities, draw any such inference. In *Crain v. U. S.*, the court, upon this question, said:

“Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try, and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury was sworn to try the issues joined.’ ”

In *Bowan v. State*, the court said:

“Under the decisions of this court, it can no longer be regarded as a subject of controversy that, where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous.”

“If the defendant stands mute, and refuses to plead, the court is authorized to enter his plea of not guilty. Rev. St. U. S. 1032. But a trial without the entry of any plea by or on behalf of the defendant is invalid.”

“It follows from the views above expressed that the judgment of the district court as to the defendant Cleveland must be, and is hereby, affirmed, and that the judgment against the defendant Shelp must be, and is hereby reversed, and the cause remanded for a new trial.”



Wyburg vs. U. S., 163 U. S. 648.

In the case of *United States v. McKnight*, 112 Fed. 983, it is said, following the *Crain* case:

“And it might be conceded to be quite true that if the record, on its face, did not show that an arraignment of the accused had taken place, and especially if it did not affirmatively show that he had pleaded to the indictment, then no issue had ever been framed for the jury to try, and the court should regard all that has been done at the latest trial, as a mere nullity.”

As seen from the foregoing the mere recital in the judgment that the plaintiff in error, was arraigned and plead not guilty to the indictment, is no such record as the law requires. That is only the stereotyped form common to all judgments in criminal cases. It is, indeed, much less than appeared in the record of the *Crain* case or in the *Shelp* case. Where the record recited that the “issues were tried,” and it was contended that that meant an arraignment and a plea, the court held the record fatally defective.

Since it would appear that the judgment must be reversed and the cause sent back for another trial, it might be said that the consideration of the other assignment of error was unnecessary. This, we must freely confess, is true. However, since it appears that the cause should be tried again, it seems very desirable that this court should pass upon the other assignments of error in order to

guide the lower court in a subsequent trial of this case. For this reason, the other assignments are canvassed in this brief.

The plaintiff in error respectfully insists that he was not convicted of the offense charged according to law, and that the judgment should be reversed and the cause remanded for a new trial.

All of which is respectfully submitted.

W. F. O'LEARY, and  
E. A. CARLETON,  
Attorneys for Plaintiff in Error.

Due service of the foregoing brief is hereby admitted this 5<sup>th</sup> day of January, 1914.

B. H. Wheeler

United States District Attorney.

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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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**MITCHELL PETERSON,**

**Plaintiff in Error,**

*vs.*

**THE UNITED STATES OF AMERICA,**

**Defendant in Error.**

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**Brief and Argument of Defendant in Error**

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The statement of the case contained in the brief of plaintiff in error omits any mention of the cow branded 17 on the left ribs, which was the property of Bad Marriage, an Indian person. This cow was described in the first count of the indictment with those mentioned by plaintiff in error on page 2 of his brief (Rec. 2). It was admitted by plaintiff in error and the evidence shows that this cow was one of the bunch received by plaintiff in error from John Bostwick on October 21, 1910 (Rec. 34, 102, 132).

We will follow the argument of plaintiff in error as it is contained in his brief.

## SPEED TRIAL.

Assignments of error numbered 1 and 2 (Rec. 178) are directed to the alleged error of the trial court: First, In refusing to dismiss the indictment against plaintiff in error; and, second, In overruling the objection of plaintiff in error to the introduction of any evidence. The motion and objection were both based upon the ground that plaintiff in error had been denied a speedy trial in violation of his constitutional right. In the brief of plaintiff in error stress is laid upon the fact that the indictment in the case at bar was found December 21, 1910, and he was not finally tried until March 26, 1913; but it should not be overlooked that a trial and conviction was had under this indictment and thereafter on October 14, 1911, this conviction was set aside by the trial court, and a new trial granted at the instance of the plaintiff in error. This being the fact, we are only concerned with the time that elapsed between the 14th day of October, 1911, the date of the granting of said new trial, and the 26th day of March, 1913, the date of the commencement of the last trial.

The trial court denied the motion to dismiss the indictment and overruled the objection to the introduction of any evidence upon the trial, upon the grounds that the same were not made in time and further that notice thereof, as required by the rules of court, had not been given (Rec. 29-30). The motion to dismiss the indictment was served upon the District Attorney

on March 24, 1913, only two days before the time set for the trial of the case (Rec. 20) ; and the affidavits, on which the motion was based, were not, curiously enough, served with said motion but were served only one day before the trial, to-wit, on March 25, 1913 (Rec. 27).

Rule No. 37 of the United States District Court of Montana provides:

“Whenever, in an action at law or suit in equity, notice of a motion is necessary, it shall be in writing, and shall state in general terms the grounds of the motion and the papers on which it is to be made \* \* \* If the person to be notified and the person who is to give notice have their offices in the city in which court is to be held, the notice must be given at least five days before the day named for the hearing of the motion. In other cases the notice must be given at least ten days before the day named for the hearing \* \* \*

“If any fact on which the motion is based be not documentary in character, it shall be shown by affidavit, or affidavits of persons within whose knowledge such fact is, and copies of such affidavits shall be served with the notice of motion.”

The barest inspection of the record makes it apparent that this rule was in two respects violated by the motion of plaintiff in error to dismiss this indictment. Five days' notice of said motion was not given, nor indeed, so far as the record discloses, any notice thereof. But if the service of the motion itself could be held to be a notice that it would be brought on for hearing at a specified date, the rule was violated as the



motion was served only two days before the hearing had thereon and the beginning of the trial. Said rule was additionally violated in that the affidavits on which the motion was based were not served with the motion, but, as a fact, were served later and only one day before the commencement of the trial. This rule clearly contemplates that one required to respond to a motion shall have at least five days' notice thereof and if the same is supported by affidavits, as in the case at bar, that he shall have five days in which to prepare counter-affidavits; for the rule explicitly provides that a motion can be brought on for hearing only upon five days' notice thereof, and the affidavits must be served with the notice. This would always give a party resisting the motion five days in which to prepare counter-affidavits if he so desired. The trial court was therefore clearly justified in denying the motion upon the ground that the same did not comply with the rules of court.

But without regard to the foregoing this motion was, not only on principle, but under the express terms of the rules of the trial court, addressed to the discretion of the court. Rule 49, subdivision 3, adopted by the United States District Court for the District of Montana on September 6th, 1912, provides that

“Every cause whether criminal, at law or in equity, in which no forward step is taken for one year, or which is not brought on for trial within one year after issue joined, may be dismissed for

want of prosecution unless good cause to the contrary be shown, *or the court in its discretion in criminal cases otherwise orders*, \* \* \*  
(Italics ours.)

Under familiar principles a court possesses the right to adopt reasonable rules, and likewise has the right to construe its own rules and enforce them. The enforcement and construction of its rules by a court is a discretionary matter that will not be interfered with by an appellate court unless the construction is clearly unreasonable and erroneous.

Hoskins v. N. P. Ry. Co., 39 Mont. 394.

Life Ins. Co. v. Francisco, 84 U. S. at 679.

Bank v Albertson, 39 Mont. 414.

Not only will courts take judicial notice of their own rules, but litigants are presumed to have knowledge of the terms thereof and to comply therewith. This being so, by the motion in the case at bar, if it were properly made and noticed, plaintiff in error invoked the discretion of the trial court as to whether or not the indictment against him should be dismissed. Having invoked the discretion of the trial court upon that particular matter he can only predicate error upon an abuse of such discretion. The burden of showing abuse of discretion rests upon the party alleging it—in the case at bar the plaintiff in error.

State Savings Bank vs. Albertson, 39 Mont.  
414.

How has plaintiff in error sustained this burden?

The record herein fails to disclose a request for a continuance by either the plaintiff or defendant in error. The affidavits relied upon by plaintiff in error to support his motion merely state: that plaintiff in error and his counsel were anxious to have the case tried and disposed of; that they "seriously doubted whether or not the government would ever try said cause or put the defendants again on trial under said indictment, but have been expecting that the aforesaid indictment would be dismissed and this impression has grown stronger the longer the government has delayed to have said causes tried again;" the remaining averments in said affidavits are merely bald conclusions and contain no positive statement of fact tending in any manner to show the slightest abuse of discretion on the part of the trial judge. (Rec. 21-27.)

But if plaintiff in error and his counsel were anxious to have this case tried and disposed of why was no motion made to have the same set for trial; and particularly is the record silent as to any objection of plaintiff in error to said cause being passed at the various terms of court, held, between the date of the granting of the new trial to plaintiff in error and the 26th day of March, 1913. It is difficult to perceive what bearing upon this motion the allegations in the affidavits have, to the effect that plaintiff in error and his counsel seriously doubted whether any trial would ever be had, or the allegation that they had expected this case to be dismissed. One under indictment is beyond doubt subject to trial regardless of his expecta-

tions or doubts. At any rate in the case at bar the affidavits fail to disclose any prejudice resulting to plaintiff in error by reason of his expectations and doubts unless indeed it be his subsequent trial and conviction.

The record further discloses the fact that plaintiff in error was at liberty on bail from the time of his arrest (Rec. 11, 13). As indicated above the affidavits tendered do not disclose that plaintiff in error ever requested that the indictment against him be brought on for trial. Additionally there is no showing whatever in the records that the delay between the granting of the new trial on October 14, 1911, and the second trial on March 26, 1913, was not founded upon a good and sufficient reason and adequate cause. Without any affirmative showing of this character, this court will presume that the trial court acted properly and that adequate cause for its action existed. Clearly if any such cause did exist, it was incumbent upon plaintiff in error to so show by his affidavits. A mere lapse of time is not sufficient to justify a dismissal.

State Savings Bank v. Albertson, 39 Mont. 414.

State v. Nugent, 71 Mo. 147.

The case of *People v. Douglass*, 100 Cal. 1, 4; 34 Pac. Rep. 490, 491, holds that in the absence of any affirmative showing error will not be presumed by an appellate court, and places upon the appellant the burden of showing by his record the facts consti-

tuting the error. In that case there was nothing in the record but the motion for a dismissal and the ruling of the court in denying the same. In the cause under consideration there is nothing but the motion, the order of court denying the motion, and the affidavits, which are barren of any fact showing how the plaintiff in error was or might be prejudiced by reason of the delay claimed by him to be violative of his constitutional right to a speedy trial.

The case of *People v. Marino*, 85 Cal. 516, cited in the brief of plaintiff in error, is not in point for the reason that it construes a statute of California, which in positive terms requires the prosecution in a criminal action not brought on for trial within the time specified by said statute, to either show a sufficing reason for the delay or suffer a dismissal of the action. In other words the burden under the California statute is upon the prosecution to make a showing, while under elementary principles the burden is upon the defendant to bring himself within the terms of the VI. Amendment of the Constitution of the United States and to show that his rights have been violated. In addition the case of *People v. Marino* is expressly disapproved by the court deciding the same in *People v. Douglass*, *supra*.

The affidavits in the case at bar entirely fail to make an affirmative showing that no sufficing reason existed for the delay in the case at bar.

It hardly seems necessary to cite authorities to



sustain the proposition: That a man cannot sit idly by thinking his case will never be tried, and when he learns it is set for trial, wait until a jury and witnesses are present in court, then bring up for hearing a motion to dismiss supported by affidavits such as are in this case, all without the proper notice of the hearing of said motion or affording to the government an opportunity to file counter-affidavits. If plaintiff in error objected to what he claims to be a long delay, he should have requested the court to set the case for trial at one of the terms of court that was passed. His failure, at any time, to make such a request, and waiting until the day of the trial to move for a dismissal comes too late.

A demand for a trial is a condition precedent to the right of discharge for delay in trial.

Hernandez v. State, 4 Tex. App. 425.

In the case just cited a principal had been convicted under other indictments and an accessory was held not entitled to his discharge on habeas corpus under Texas Constitutional Bill of Rights, Art. 1, §10, guaranteeing that the accused shall have a speedy public trial, where no showing was made that accused had ever demanded or been refused a trial. This constitutional provision of Texas is practically identical with the VI. Amendment to the Constitution of the United States.

See also, the case of Dillard v. State, 46 S. W.

533-534, where, on facts very similar to the case at bar, it was held that no error was committed in refusing to dismiss the cause on motion of the defendant, although there was a statute defining the meaning of the constitutional provision guaranteeing accused a speedy trial.

In the case of *Dillard v. United States*, 141 Fed. Rep. 303, 306, it was held that the refusal of the court, during the taking of testimony in a criminal case, to permit the presentation of a motion to dismiss as to certain counts of the indictment, was a matter entirely within its discretion.

In the case of *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830, 831, in passing upon the question of error in refusing to grant a motion to dismiss, the facts being as follows:

“On the 3rd of September the case was set for hearing on the 25th of September, 1888. On that day before the trial commenced, the defendant by his counsel, moved the court to dismiss the case, and discharge the defendant, on the ground that his case had not been brought to trial within 60 days after the filing of the information. Affidavits were filed by both sides upon the motion, which was then denied by the court, the defendant excepting. The trial then proceeded and the defendant was found guilty of burglary in the first degree.”

and the Supreme Court of California held:

“There was no error in the refusal of the court

to dismiss the case upon the defendant's motion, made under subdivision 2 of §1382 of the Penal Code. There was no abuse of discretion within the rule laid down in *People v. Camilio*, 69 Cal. 540."

See also: *State Savings Bank v. Albertson*, 39 Mont. at page 420, 421.

*Strong v. Grant*. 99 Cal. 100, 33 Pac. Rep. 733.

In the case last cited the question is most ably discussed both in the opinion by the court and the concurring opinion by Chief Justice Beatty, and the Supreme Court of California expressly held in said case:

"When a motion is made for the discharge of a defendant under this section, the question involved is a judicial question, involving in its decision the exercise of judicial discretion\* \* \*"

The case of *U. S. v. Fox*, 3 Mont, 512, cited by plaintiff in error is clearly not in point, for the reason that Fox had demanded a trial and urged a disposition of his case.

The case of *Beavers v. Haubert*, 198 U. S. 86, also has no application to the question under consideration, as it only holds that the removal of the accused from one jurisdiction to another was not the refusal of a speedy trial.

It is likewise to be observed that the other cases cited by plaintiff in error have no bearing upon this question as they all arose under statutes peculiar to

the various jurisdictions they are from. Plaintiff in error was bound by Rule of Court 49-3, and in the absence of any showing that the trial court abused its discretion in denying the motion the judgment should not be reversed.

### ADMISSIBILITY OF EVIDENCE.

The evidence which plaintiff in error claims was improperly admitted and greatly prejudicial to him is all in relation to certain other cattle found in his possession at the same time the cattle described in the indictment were alleged to have been received by him (Rec. 37-41). The owners, of these cattle not described in the indictment and to which this testimony related, all testified that: they had turned the cattle out on the range and had not seen them again until they found them in the government corral at the agency; all this was within a short time prior to the time plaintiff in error is charged by the indictment with receiving the cattle mentioned therein; that these cattle had never been sold, but had been stolen and branded with the Peterson's brands and that the placing of such brands upon them was wholly unauthorized (Rec. 64-78).

The evidence was relevant only and introduced solely for the purpose of showing intent and guilty knowledge on the part of plaintiff in error, and the court so charged the jury (Rec. 63; 146-147).

In cases where accused is charged with receiving stolen property, evidence of his having other stolen

property in his possession, especially of a like character, is always admissible for the purpose of showing intent and guilty knowledge on the part of accused that the property for receiving which he is charged was stolen. This is one of the well recognized exceptions to the general rule that evidence of a separate and distinct crime, unconnected with that laid in the indictment, cannot be given in evidence.

State v. Crawford, 39 S. C. 343, 17 S. E. Rep. 799.

Commonwealth v. Hills, 10 Cush. 530.

Commonwealth v. Johnson, 19 Atl. Rep. 402.

State v. Habib, 18 R. I. 558, 30 Atl. Rep. 462.

Beuchert v. State 155 Ind. 523, 76 N. E. Rep. 111.

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

Sapir v. U. S. 174 Fed. 219.

In Wharton's Criminal Evidence (10th Ed.), § 35 at page 135, the rule is stated as follows:

“In prosecutions for receiving stolen goods, guilty knowledge is the gist or substance of the offense to be established by the prosecution; and evidence of collateral offenses is admissible to establish such knowledge.”

Counsel for plaintiff in error contends there is no evidence in the record to show when these other animals were stolen or when they were bought or received. The record shows they were in the possession



of defendant (Rec. 37-41) and also the owners testified that they were all stolen (Rec. 64-78) and that the thief, Bostwick, testified that he had delivered some of them (Rec. 86-122), and plaintiff in error swore under oath that he had received the P lazy S cow (Rec. 132), and the owners all recovered these various animals from the bunch of cattle found in the possession of plaintiff in error (Rec. 64-78).

The testimony of the owners that property was stolen and of the thief that he stole it is sufficient to prove the character of the other stolen goods not mentioned in the indictment.

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

In addition to the above, the fact that a man has possession of goods shown to be stolen is all that is required under the rule permitting evidence of his possession to be admitted, and the cases cited herein so hold, eye-witnesses of his receiving are not necessary.

The Supreme Court of South Carolina in the case of State v. Jacob, 30 S. C. 131, 8 S. E. Rep. 698, 700, in passing upon the question of the admissibility of evidence of this kind in a case where a person was accused of receiving stolen goods, said:

“It does not seem to use that there was any error in receiving the testimony which is made the basis of the second and third grounds of appeal. As appears from the extract made from the

judge's charge above, this testimony was received solely as a circumstance tending to show guilty knowledge on the part of the defendants, and the jury were carefully instructed to consider it only in that light \* \* \* So here, while the fact that one has received a single article of stolen goods would afford but slight, if any, evidence that he knew such article was stolen, yet if it is shown that he has received a number of articles of stolen property, especially where, as in this case, such articles were shown to have been stolen from the same person, and probably about the same time, this is a circumstance from which guilty knowledge may be inferred, though the weight to be attached to such circumstance is exclusively for the jury."

It is not necessary that the property not described in the indictment should have been stolen from the same person or be of the same character, in order to render evidence that they were in the possession of a defendant admissible.

The Court of Appeals of New York, in the well considered case of *People v. Doty*, 175 N. Y. 164, 67 N. E. Rep. 303, said:

"Our conclusion, therefore, is that neither authority nor principle require us to hold that, in prosecutions for receiving stolen property, evidence of other receivings by the same defendant from the same thief can be admitted upon the question of a defendant's guilty knowledge only in cases where the different thefts have been made from the same owner; but, on the contrary, we think there are cases, of which the one at bar is a

fair sample, in which the guilty knowledge of a defendant in the receiving of property charged in the indictment to have been stolen may be established by evidence of other receivings from the same thief, although in each case the property may have been taken from a different owner.”

See also: *State v. Jacob*, 30 S. C. 131, 8 S. E. Rep. 698.

In the case of *Harwell v. State*, 22 Tex. App. 251, 2 S. W. Rep. 606, the court said:

“The defendant objected to the testimony in relation to two yearlings not mentioned in the indictment, he being charged with respect to only one of said animals. The objections were overruled and he excepted. We are of the opinion that said testimony was properly admitted for the purpose of proving fraudulent intent on the part of the defendant with respect to the yearling named in the indictment and knowledge on his part at the time of receiving said yearling that it was stolen property.”

The case of *Morgan v. State* (Tex.) 18 S. W. Rep. 647, is one in which the facts are very much like the case under consideration, and in passing upon the question of the admissibility of evidence tending to prove the receiving of other stolen property by the defendant than that charged in the indictment the court said:

“This evidence was offered for the purpose of showing the intent of the defendant with reference to receiving the cattle mentioned in the indictment. This testimony was objected to by the defendant,

because the cattle had not been taken about the same time and place as that charged in the indictment, and because it was not shown that the defendant received said cattle at the time and place and from the same parties from whom he had received the one head of cattle alleged in the indictment. It is further shown by the qualification of the judge to this bill of exceptions that, after the state closed its evidence, this testimony, as objected to by the defendant, was withdrawn from the jury, and they were instructed by the court, that the defendant had not been connected with the said cattle, and they would not consider it for any purpose. We are of the opinion that the testimony was admissible in the first instance, and that the defendant cannot complain, inasmuch as the court withdrew the testimony from the consideration of the jury, and told them not to consider it for any purpose. We are of the opinion that the testimony should have been admitted as it tended to prove the fraudulent intent upon the part of the defendant with respect to receiving the one head of cattle named in the indictment, and with knowledge on his part at the time he received said yearling that it was stolen. *Harwell v. State*, 22 Tex. App. 251, 2 S. W. Rep. 606. It also tended to show a systematic plan on defendant's part to commit the crime charged. *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. Rep. 215. \*

\* \* \* Though the animals may have been received by him at different times or different days, still we are of the opinion that the evidence was legitimate to show defendant's intent, as well as knowledge on his part that they were stolen property. All these animals were subsequently found by parties owning or claiming them, in



Owen's pasture in the Indian Territory, where they had been placed by Owens after the delivery of the same by defendant."

That the case of *Prettyman v. U. S.*, 180 Fed. 30; 103 C. C. A. 384, cited by plaintiff in error, is not an authority in his favor but sustains the rule above advertised to, the barest inspection thereof discloses:

"\* \* \* \* where the intent with which an act charged to be criminal has been done becomes important, as it necessarily is in this case, then, within certain limits, proof of similar acts of the accused is admissible in order to show the intent with which the act charged in the indictment was done."

What pertinency to the case at bar the case of *Brewer v. U. S.*, 139 U. S. 288, cited by plaintiff in error, has, is difficult to understand, as the only question there passed upon was the sufficiency of an indictment to which a demurrer had been interposed.

### WITHDRAWING TESTIMONY FROM THE JURY.

The trial court in ruling upon the objections to the testimony, mentioned in the last subdivision of this brief, properly stated that he permitted such testimony to be introduced only for the reason that it was a circumstance which the jury were at liberty to consider in finally determining whether plaintiff in error had guilty knowledge that the goods described in the indictment were stolen. (Rec. 63.)



The court further emphasized the purpose for which this evidence was permitted to be introduced in his instructions to the jury. (Rec. 146-147), and at the same time withdrew from the consideration of the jury all testimony relating to any animal not described in the indictment, except the T Anchor P steer belonging to Dave Pambrum, the TS cow belonging to Brocky, and the CZ steer belonging to Flat Tail. (Rec. 147.)

Under the rule laid down by the authorities cited in the preceding subdivision of this brief, all of such testimony was properly admitted in the first instance, and plaintiff in error has not been prejudiced by that portion of the testimony which was withdrawn from the consideration of the jury by the instructions.

In the case of *Morgan v. State*, *supra*, the same kind of testimony was introduced, and later withdrawn from the jury by the court, and the appellate court held that had the evidence been improperly admitted the withdrawal of it cured the error.

The Supreme Court of the United States, in passing upon the question of whether error committed in the admission of irrelevant testimony was subsequently cured by an instruction of the trial court telling the jury to disregard it, said:

“The charge from the court, that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by

instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty in that respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury and commence anew. A rule of practice leading to such results cannot meet with approval."

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 145.

The case of Throckmorton v. Holt, 180 U. S. 549, cited by counsel for plaintiff in error is not in point. In that case the court only held that certain evidence improperly admitted at the trial was not properly withdrawn from the consideration of the jury by the trial court, inasmuch as the court did not specifically draw the attention of the jury to what particular evidence was withdrawn and the names of the witnesses who gave it, in a manner calculated to be understood by the jury. In the case at bar the trial judge was most specific in his charge to the jury and indicated with great particularity exactly what testimony was and what was not to be considered by the jury.

## BOSTWICK WAS AN ACCOMPLICE.

Plaintiff in error contends that the witness Bostwick was an accomplice and the court erred in refusing to give to the jury his requested instruction No. VII.

It should be borne in mind that Bostwick was the person who had stolen the cattle described in the first count of the indictment, had pleaded guilty of larceny—was the self-confessed thief of such cattle.

In Wharton's Criminal Evidence (10th Ed.) §440, p. 922 an accomplice is described as follows:

“An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The co-operation must be real and not merely apparent.”

Can Bostwick be said to come within the meaning of this definition? His crime was the larceny of the cattle described in the indictment, and the crime for which plaintiff in error had been indicted was the receiving of such stolen cattle knowing them to have been stolen. Can the acts of these two parties be said to have been committed knowingly and voluntarily with a common intent?

Section 287 of the Criminal Code of the United States defines larceny and section 288 of the same code defines the receiving of stolen goods. These two sections make the doing of either a crime. These two crimes are made separate and distinct offenses and the

commission of either one does not involve the commission of the other, except that the goods received must have been stolen and the receiver have obtained possession of them with a knowledge of the stealing. It is not necessary to secure the conviction of a person charged with receiving stolen property to prove that the thief had been convicted for the theft of such property, all that is necessary in that behalf is to show that the property received by the defendant was received with a knowledge of its having been stolen.

Kirby v. U. S., 174 U. S. 53-60.

Birdsong v. State, 48 S. E. 330.

Springer v. State, 102 Ga. 447, 30 S. E. 971.

“By statute now in most, if not all, jurisdictions receiving stolen goods is made a separate and substantive offense.”

34 Cyc. p. 515 and cases cited in footnote 7.

“Since modern statutes made receiving stolen goods a substantive offense the *offenders under them are not accessories*, and it is not necessary for a conviction to show that the principal thief has been convicted.” (Italics ours.)

34 Cyc. p. 519.

Leonardo v. Territory, 1 N. Mex. 291.

Wright v. State, 57 S. E. 1050.

Engster v. State, 10 N. W. 453.

State v. Greenburg, 59 Kan. 404, 53 Pac. 61.

However, for the sake of argument, only, let us concede that Bostwick was an accomplice, still under

the common law his testimony did not have to be corroborated, and in the absence of a statute requiring it it does not have to be corroborated now.

We concede that the general rule, under statutes requiring it, is that the testimony of an accomplice must be corroborated. This rule, however, is only because of the statutory requirements. There is no statute of the United States requiring the testimony of an accomplice to be corroborated, and, in the absence of such a statute, the rule is as stated in Wharton's Criminal Evidence (10th Ed.) pages 926, 927:

“In the absence of a statute requiring corroboration, a conviction may be sustained on the testimony of an accomplice alone.”

Plaintiff in error's requested instruction No. VII. was properly refused and the instruction given to the jury by the trial court (Rec. 165) is the rule that has always been followed in the United States' Courts. It is likewise to be noted that the contention of plaintiff in error that the rule governing the testimony of an accomplice in Federal courts is the same as in the State courts is incorrect.

The decisions of the Circuit Court of Appeals of the Second Circuit sustain the refusal of the trial court in the case at bar and approve the instruction he gave as to Bostwick's testimony. In the case of *Hanley v. U. S.*, 123, Fed. 851, the court said:

“It is further argued that the court erred in refusing to charge that the testimony of William A.



Clark, he being a self-confessed accomplice, must be corroborated as to some of the material facts. The statutes of New York do not permit conviction in the courts of that state on the uncorroborated testimony of an accomplice. Those statutes, however, do not regulate proceedings in the federal courts, there is no similar federal statute, and in the courts of the United States the rules of law governing the reception and consideration of the testimony of accomplices are those of the common law. Upon this branch of the case the court, calling attention to the fact that the New York statute did not apply, instructed the jury as follows: 'It appears from the testimony that Clark was an accomplice; that is admitted by Clark as well as by the government. \* \* \* Courts have always regarded the testimony of admitted accomplices with considerable suspicion; and it is perfectly proper for me to say that before you give the testimony of Clark full credit you should carefully scrutinize his testimony. \* \* \* \* you should compare it with other testimony in the case for the purpose of ascertaining whether or not it is corroborated. If, as a result of the examination which you give to the evidence—to all of the evidence in the case—you conclude that his testimony with respect to a material part is corroborated, then and in that case you are justified in giving full credit to the testimony of Clark. \* \* \* The common-law rule is that accomplices are competent witnesses against their criminal associates. \* \* \* For that reason the testimony of Clark is submitted to you for your consideration. As, I have already stated, you are required to give it careful consideration.'

"The defendant was not entitled, under the

authorities, to insist upon more specific instructions as to the corroboration of Clark's testimony." (Citing many cases.)

And this case was approved by the same court in the case of Ahearn v. U. S., 158 Fed. 606, 607, where the court said:

"The court charged the jury as to the weight to be given to the testimony of an accomplice, as to felonious intent, and as to the presumption of innocence. The testimony of the accomplice was corroborated as to several material facts, *although corroboration is not essential in the federal courts.* (Hanley v. United States 123 Fed. 851, 59 C. C. A. 153), and could not have been withdrawn from the jury. It was for them to say what weight should be given to it." (Italics ours.)

In the case of Richardson v. U. S., 181 Fed. 1, where the court refused a request almost identical with the one refused in the case at bar, and the court instructed the jury almost in the same terms as was done in the trial of the present case, the Circuit Court of Appeals, Third Circuit, most ably discussed the subject saying:

"It is finally urged that the jury were allowed to convict on the uncorroborated testimony of accomplices, without being warned as to the caution with which such testimony is to be received. It is denied by the government that the clerks who made the false entries under the direction of the defendant were in any sense accomplices; and the requests in which it is assumed that they were could not therefore have been affirmed. But in

those where this mistake is avoided, the court was asked to charge that if these witnesses were accomplices their testimony was not to be regarded unless corroborated by unimpeachable testimony in some material point. This went far beyond the accepted rule and was properly refused. There is nothing which forbids the conviction of a defendant, at common law or in a federal court, on the uncorroborated testimony of an accomplice, as is there assumed. 12 Cyc 453; *United States v. Giuliani* (D. C.) 147 Fed. 594. No doubt there is a well established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of accomplices without material corroboration, coming, as it does, from a polluted source. But this is as far as the matter goes. See *Holmgren v. U. S.* 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed—. And corroboration not being indispensable, an instruction that the credibility of a witness is weakened by its absence, and that the jury ought to acquit where there is none, encroaches on the prerogatives of the jury who have the right to rely on such evidence if they are satisfied with it. (12 Cyc. 600); and the court may therefore, without error, refuse to charge that they ought not. *Commonwealth v. Bosworth*, 6 Gray (Mass.) 479. The requests were more than cautionary. They went the full length of declaring that the testimony of the witnesses, if accomplices, without being corroborated by other unimpeachable testimony in some material part was not to be believed. To have given these instructions would have been a clear mistake. The court may not have said all in this direction that it might. But it did say that the evidence was to be carefully

scrutinized, which called the attention of the jury to their duty in this regard, and it was not bound to say more.”

While it is remarkable to note that no authority is cited by plaintiff in error sustaining his contention that the rule governing the testimony of accomplices is the same in federal courts as in state courts, it is more remarkable to learn on a reading of the cases cited by him that the case of *Reagan v. U. S.*, 157 U. S. 301, sustains our contention that there was no error in the court’s refusal to give requested instruction No. VII., requested by plaintiff in error. In that case the court said:

“The court should be impartial between the government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice.”

and this is exactly what the trial court in the case at bar did.

The case of *Grim v. U. S.*, 156 U. S. 604, in no manner sustains the contention of plaintiff in error, for the reason that that case merely holds that a detective’s actions, such as are disclosed by the facts of that case, in securing evidence, were proper.

## INSTRUCTIONS OF THE COURT. GUILTY KNOWLEDGE.

Counsel for plaintiff in error devotes many pages of his brief in an endeavor to show that error was com-



mitted by the trial court in its instruction to the jury. The particular error urged in said brief is predicated upon those portions of the court's instructions, in which the jury was told what constituted knowledge that the goods received were stolen, and how that fact of knowledge was to be determined by the jury. That these portions of the instructions quoted by plaintiff in error are a series of propositions can hardly admit of doubt.

The rules of the Circuit Court of Appeals for the Ninth Circuit provide:

"The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

Rule 10.

The record is barren of any specific exception, taken by plaintiff in error, to any portion of the instruction, given to the jury, defining knowledge. The only exceptions of plaintiff in error to the instructions of the court that can even be thought to have been directed to the quotations from the instructions contained in the brief of plaintiff in error, are:

"I think the defendants, jointly and severally,



will except to that portion, for the sake of the record as to all those portions of the charge which imply or suggest that anything less than knowledge would be sufficient to convict." (Rec. bottom page 166, top page 167.)

"Also to the modification which the court gave of instruction No. 9 and also to the refusal of the court to give the modification in instruction No. 1 of instruction No. 4." (Rec. 167.)

How can such exceptions, as those above quoted, be said to comply with rule 10, *supra*, and have been directed to the specific portions of the instructions given to the jury which counsel for plaintiff in error so strenuously insists were error? There is nothing in the record showing: that plaintiff in error stated "distinctly the several matters of law in such charge to which he excepted" or that he deemed the definition of knowledge given by the court to the jury to be improper, or that he objected to all the portions of the charge which he quotes in his brief. The exception was first directed to anything "that would imply or suggest that anything less than knowledge would be sufficient to convict." That of necessity was confined to that portion of the charge which told the jury that defendants must have had knowledge of the character of the stolen goods at the time of the receiving and cannot be held to apply to the courts instructions defining knowledge. It cannot be said that all of the points raised in the brief were called to the attention of the court by the exception taken on the trial.

In those portions of the charge quoted in the brief of plaintiff in error nothing is said by the court that would imply or suggest that anything less than knowledge was sufficient to convict. The court told the jury that the cattle must have been received with a knowledge, on the part of the defendants, that they had been stolen (Rec. 150), and the court then carefully explained to the jury that knowledge need not be shown by eyewitnesses or by positive testimony, but the fact that defendants had knowledge could be inferred from circumstances proven by the evidence (Rec. 150-154) and finally the court said:

“From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant \* \* \* knew the property was stolen.” (Rec. bottom page 153.)

The law is too well settled to admit of doubt that a defendant must specifically point out to the trial court the exact portion of the instructions that are excepted to and must also direct the attention of the trial court to the particular language which is claimed to be an erroneous statement of law.

In passing upon the sufficiency of an exception to instructions, the Supreme Court of the United States, in the case of *Allis v. U. S.* 155 U. S. 117, 122, said:

“To the charge, of which the only portions preserved in the record are those just referred to, a single exception was taken in the following

words: 'The defendant excepts to the action of the court in recalling the jury and in arguing the testimony and stating part of the testimony on certain points without stating the entire testimony. It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury and sought to coerce a verdict. But the exception taken is not sufficient to bring all these matters before us. There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of this court provides: 'The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.' Repeated decisions have emphasized the necessity of strict adherence to this rule: 'However, it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of require that the

attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.' (Harvey v. Tyler, 69 U .S. 2 Wall. 328, 329.) 'If it was intended to save an exception as to distinct propositions embodied in the instructions the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed.' Moulor v. American L. Ins. Co. 111 U. S. 337. 'An exception' to all and each 'part of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it.' Block v. Darling, 140 U. S. 234, 238."

This Court, in the case of Shelp v. U. S., 81 Fed. 700, held, in passing upon exceptions taken to a charge, the following:

"But, if defendant's counsel were of the opinion that the language used in clause ("3") was susceptible of such a construction as to make it the duty of the jury to consider such outside matters (irrespective of the evidence given at the trial), it was their duty to have specifically called the attention of the court to that fact, so that the meaning of the language used could have been amended or explained so as to deprive it of such meaning, or a proper instruction might have been prepared by counsel, with a request that it be given to the jury. It is the duty of counsel to call the attention of the court specifically to the precise point, phrase, or sentence which is claimed



to be erroneous, so as to give the court an opportunity, before the jury retires to correct it. A general exception to a whole charge is insufficient.

‘The rule is well settled that an exception to an entire charge of a court, or to a series of propositions contained therein, cannot be sustained if any portion thus excepted to is sound. This rule is established in nearly every state of the Union, and in all of the national courts, and applies to both civil and criminal cases. *Harvey v. Tyler*, 2 Wall. 338; *Beaver v. Taylor*, 93 U. S. 46, 54 (and many other cases) \* \* \* \* In *Harvey v. Tyler* the court said that justice itself and fairness to the trial court ‘require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter, and remove the ground of exception.’ In *Beaver v. Taylor*, the court said: ‘If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained.’”

The rule laid down in the above cases applies to both civil and criminal cases.

*Bram v. U. S.*, 168 U. S. 572.

Can it possibly be said that counsel for plaintiff in error, by making the exceptions that he did, specifically directed the attention of the court to those portions of the charge, or the particular language, he now claims are covered by his exceptions? The argument of counsel for plaintiff in error, as contained in his



brief, certainly covers every possible phase of objection that anyone could raise to the instructions on this feature. To attribute to any trial judge the ability to understand that such exceptions, as counsel for plaintiff in error made, included all he now contends for such exceptions, would indeed be attributing to such judge the omniscience of the Deity. Judges are only human and cannot intuitively discern the ideas that exist in the minds of counsel. It is for this reason that appellate courts have universally held that exceptions must be specific and directed to the particular language and portions of the instructions they are intended for.

Paraphrasing the language of Mr. Justice Brewer, in the opinion in the case of *Allis v. U. S.*, *supra*. Evidently the claims of counsel for plaintiff in error that the court erred in its definition of knowledge is an afterthought from subsequent study of the record. But it is settled that no afterthought justifies a reviewing court in reversing a judgment.

However, should it be held that the foregoing exception of plaintiff in error is sufficient, it is respectfully submitted that no error was committed by the trial court in charging the jury as it did. These instructions were entirely in accord with the great weight of authority. See cases cited in this brief, *supra*, under title "Admissibility of Evidence."

It is to be further observed that detached portions of a charge should not be considered without a refer-

ence to the rest of the instructions given. Instructions should be read and construed together.

Western M. I. Co. v. Norwich &c Co., 12 Wall. 201, 20 L. Ed. 380.

“Whenever instructions considered as a whole are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction considered, alone, may be subject to criticism.”

State v. Bartmess, (Ore.) 54 Pac. Rep. 167 and cases cited therein on page 172.

The rule just stated is so well established that further citation of authority is unnecessary.

Under the cases cited in that portion of this brief, entitled “Admissibility of Evidence,” it is shown that evidence of facts showing circumstances, from which guilty knowledge may be inferred, is proper. If the evidence was in the first instance properly admitted it can hardly be said that the court cannot instruct the jury that they have the right to take the same into consideration, if it is believed by them.

It is true that there is some conflict among the authorities as to just what facts and circumstances are sufficient to warrant the jury in finding that the receiver took the stolen goods with knowledge that they were stolen. The weight of authority is in favor of the rule that if the circumstances are such as would charge a reasonably prudent man with knowledge conviction

is proper. In no case has it been held that absolute knowledge must be shown by direct testimony; indeed, it is seldom possible that direct evidence is capable of being introduced on such an issue.

The contention of plaintiff in error that the true rule is an individual test, in each case, cannot be considered here, for under the authorities, *supra*, requiring a definite exception on his part he should have called that to the attention of the trial court, and in the absence of any showing that he was not satisfied with the instructions of the court in that behalf he is precluded from raising the question on appeal.

In the case of *Collins v. State*, 33 Ala. 434, 73 Am. Dec. 426, the supreme court of Alabama, in passing upon an instruction similar to those complained of here, said:

“The charge of the court to which objection is here urged, throwing it into the form of a charge given, may be thus stated without doing violence to any of its terms: ‘If you find the goods had been stolen, then, on the question of knowledge, I charge you, that if you find the defendant received and concealed the goods, and received them under such circumstances that any reasonable man of ordinary observation would have known that they were stolen and if you find that the defendant knew of those circumstances, then you are authorized to find that the defendant knew they were stolen.’

“It will be observed that this charge presents no question of what facts are necessary to constitute

elements of a felonious receiving, under the statute: Code §3178. Its whole force is expended on the question of knowledge. \* \* \* \* It simply instructed that body (the jury) that if the specified facts existed, they were authorized—permitted, had authority—to find the fact of knowledge.

“Knowledge of the theft, as an element of the offense, denounced by §3178, could rarely be the subject of direct proof. Like most facts, it may be inferred from other sufficient facts and circumstances. In criminal trials, the jury are charged with the ascertainment of the facts, and in doing so are permitted to draw all reasonable and satisfactory inferences \* \* \* \* The charge asserted a correct legal proposition.”

The supreme court of Georgia, citing with approval the words of the decision of said court in *State v. Cobb*, 76 Ga. 666, said in the case of *Birdsong vs. State*, 120 Ga. 850, 48 S. E. Rep. 329, 330, the following:

“ ‘Circumstances may convict of the defendant’s knowledge, as well as actual and direct proof. Indeed, it is rare that knowledge can be brought home to the receiver of cotton or other goods stolen by somebody who knows what the receiver knew touching the fact that they were stolen. The circumstances, the time, the secrecy, all the transactions before, at the time, and afterwards, may be brought to bear upon what was knowledge of the receiver; and if from all these the jury can conclude that the receiver did have good reason, *as a reasonable person, to believe or suspect* that the goods were stolen, they may well conclude, if

he did not inquire and investigate before he received them, that he had knowledge, such as the law will charge him with, of the character of the goods, and of the person from whom he received them.' As the court below very aptly charged, knowledge is the essence of the offense, and unless there be a guilty knowledge, there can be no conviction. Again, quoting from the Cobb case, *supra*: 'Knowledge may well be deduced from the conduct and behavior, the character of the person from whom received, and the kind of goods, and the hour when received.' (Italics ours.)

The word "knowing," as used in a statute similar to the one under which plaintiff in error was convicted, has been defined by the supreme court of Oregon, in the case of Tucker v. Constable, 16 Ore. 407, 19 Pac. Rep. 13, 14, as follows:

"The word 'knowing,' as used in this statute, does not imply exact knowledge. I think that notice in its legal acceptation is what the statute requires. It is such information as would lead a prudent man to believe that the fact existed, and that, if followed by inquiry, must bring knowledge of the fact home to him. It is not necessary that this information should be formally communicated to the party to be affected by it. But if in any way he has become possessed of such information and it is of such a nature as to induce a prudent man to believe in its truth, he is not at liberty to disregard it, and if he does he will thereafter act at his peril. In such case information which a prudent man believes, or has reason to believe, is true, if followed by inquiry, must lead



to knowledge, is itself equivalent to knowledge. When the rights of others are concerned, a man possessed of such information must not shut his eyes."

Wharton's Criminal Law (11th Ed.), § 1230, page 1449, lays down the rule as follows:

"Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; \* \* \* That which a man in defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries."

See also:

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

Commonwealth v. Leonard, 140 Mass. 473, 4 N. E. 96.

State v. Feuerhausen, 96 Iowa, 299 65 N. W. 300.

State v. Druxinman, 75 Pac. 814, 34 Wash. 257.

State v. Feiss, 66 Atl. Rep. 418.

Counsel has cited a few cases which hold, as he claims, that portions of the instructions were erroneous, but all of the cases which are cited by plaintiff in error under this heading do not hold as he claims they do. The barest examination of such cases will confirm this

statement.

The case of *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, contains the words he has quoted from it but these were stated in that portion of the opinion passing upon the indictment and not on instructions.

In the case of *Pickering v. U. S.* 101 Pac. 123, the court held the instruction to be a comment on the evidence—no such contention is made in the case at bar.

In *Toliver v. State*, 8 S. W. 806, the appellate court merely held the evidence was insufficient to sustain the verdict. The same holding was made in the case of *Stripland v. State*, 40 S. E. 993.

It is most significant to note that the instruction quoted in the brief of plaintiff in error, from the case of *Kirby v. U. S.*, 174 U. S. 47, was not considered by the supreme court of the United States in deciding that case. The sole ground for reversal in the *Kirby* case, instead of being on account of such instruction, was solely that it was held that defendant had not been confronted with the witnesses for the government. If anything can be assumed from the *Kirby* case, as to the correctness or incorrectness of this instruction, which counsel for plaintiff in error quotes, the assumption must be in favor of defendant in error, as that instruction is similar to what is complained of in the case at bar. If the giving of said instruction in the *Kirby* case was so greatly prejudicial to a defendant, the appellate court would, at least, have commented

upon it in a few words and not have passed it without a word of condemnation or approval.

If any of the cases cited in the brief of plaintiff in error hold contrary to those cited herein, they assuredly are, as was said in *Ex parte Drexel*, 82 Pac. Rep. 429, "not of sufficient consequence to ruffle the great current of authority which runs the other way."

It is respectfully submitted that, in the instructions complained of, the jury was told nothing more than the meaning of the words "knowing the same to be stolen," and how knowledge could be determined. Such instructions did not imply or suggest, and were not intended to imply or suggest to the jury, that anything less than knowledge was sufficient to convict.

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## REMARKS OF THE COURT.

The argument of counsel for plaintiff in error under this heading is very interesting and is undoubtedly what he very much desires to have adopted as the law. Inasmuch as no cases are cited by plaintiff in error to sustain this argument we assume there are none in his favor, and content ourselves with the following quotations and citations which conclusively show that it was proper for the trial court to refuse to accept an incomplete verdict. No error was committed by the court in mentioning to the jury the fact that great expense had been incurred in trying the defendants and that both the government and de-

endants were entitled to have the case determined.

Wilson v. State, 29 So. 569, 572.

Johnson v. State, 60 Ark. 45; 28 S. W. 793.

Allis v. U. S., 73 Fed. at 182.

In the absence of any showing that prejudicial error resulted to defendant, by reason of the remarks of the trial court to the jury, that it involved a great expense to get a new jury, and for them to return to the jury room and consider their verdict until they agreed, which they did and returned a verdict a few minutes later, no error would be presumed.

Jordan v. State, 30 S. W. 445.

In the case of Allis v. U. S. 73 Fed. 182, Sanborn Circuit Judge, gave a charge to the jury under circumstances very similar to those in the case at bar, and the language of Judge Sanborn was almost identical with that now under consideration. This was held not to be error by the supreme court of the United States, on an appeal to it,

Allis v. U. S. 155 U. S. 117, 15 Sup. Ct. 36.

Similar remarks of the court to the jury were held not to be error in the case of State v. Gorham (Vt.), 31 Atl. 845; we quote from the syllabus:

“A statement by the court to a jury upon their being sent back after disagreement, to further consider the case, that the trial had been ‘quite expensive to the state, and the expense ought not to

be thrown away,' accompanied by reasons showing that the prisoner's interests would be served by a determination of the case, was not erroneous, as attempting to induce an agreement on account of the expense to the state."

The supreme court of Wisconsin has likewise held the same in the case of *Hannon v. State*, 36 N. W. 1, where it is said:

"The learned judge stated to the jury that 'the county ought not to be subjected to the costs of another trial if it can be avoided.' To this, exception was taken. It may not be good taste to call the attention of the jury to the fact that the county or state will be subject to pecuniary loss if the jury fail to agree, especially in a criminal case, but we cannot say that it is error. It does not mislead, or tend to mislead, the jury as to the facts of the case under consideration; and it might, if it had any effect, be as effectual in inducing the jury to acquit the accused as to convict him."

The supreme court of California in the case of *People v. Miles*, 143 Cal. 636, 77 Pac. Rep. 666, where the remarks of the court as to the cost and expense of the trial and his insistence upon an agreement of the jury were much stronger than in the case at bar, held that no error was committed.

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## INSUFFICIENCY OF THE EVIDENCE.

Inasmuch as the court will carefully read the evidence contained in the record for the purpose of satis-



ifying itself as to its sufficiency or insufficiency, any attempt of counsel for either plaintiff or defendant in error to state in a few paragraphs just what was proven on the trial is of little value to the appellate court. In the present case, however, we desire to call the attention of the court to certain matters that counsel for plaintiff in error has evidently inadvertently overlooked, in his statement of what was proven.

The record contains an admission on behalf of plaintiff in error that with the exception of three head described in the fourth count, he received, branded, and had in his possession the cattle described in the indictment, and such cattle were at that time stolen property (Rec. 34). This eliminates these important questions from an investigation of the transcript.

Counsel for plaintiff in error further admitted that the cattle, not described in the indictment, and the brands on them, were owned by the various parties testifying to those facts, and that such owners never sold or disposed of the same, or gave anyone permission to drive them away. (Rec. 70, 71.)

The evidence shows that the CZ steer (Rec. 39), the T Anchor P steer (Rec. 40, 57), were found in the possession of plaintiff in error. In case there should be any doubt as to whether or not the admission, above mentioned, covered these animals, a reference to the record will show that they were stolen (Rec. 78, 79; 70, 65).

Bostwick testified that he sold the Connolley and Cobell steers to Mitchell Peterson in July, 1910, (Rec. 87), and that two or three months afterwards Connolley found these steers with the Peterson brand on them, claimed them, and plaintiff in error permitted him to take them away, and later plaintiff in error made Bostwick repay the purchase price of \$60. because these steers had been stolen. (Rec. 88, 117, 121). The witness Burd corroborates this (Rec. 122, 123). Bostwick testified that he stole these two steers (Rec. 89).

The T Anchor P. Steer is certainly entitled to the separate caption given it by plaintiff in error in his brief. This steer was not only proven to have been stolen by Bostwick but also that the theft occurred in the presence of plaintiff in error, and it was purchased by him for a greatly inadequate price. The price of the other cattle sold to plaintiff in error was \$30, but this choice steer only brought \$18.00 (Rec. 99, 100, 113, 114, 115).

The incident of the Cobell and Connolly steers being claimed by Connolly happened shortly before the purchase of the T Anchor P. steer and the four head described in the first count of the indictment (Rec. 100, 101). The roundup quit about October 19th, 1910, (Rec. 95). The T Anchor P. steer was first seen by Bostwick about that date (Rec. 98), and a day or two afterwards it was sold to plaintiff in error (Rec. 99), and on the 20th of October the four head

described in the first count were sold to him (Rec. 107) they were picked up by Bostwick on October 18th or 19th (Rec. 96).

The plaintiff in error did not introduce any evidence to deny anything said by the witness Bostwick, or in fact any other witness. The jury had the right to believe or disbelieve the evidence introduced. They are presumed to have followed the instructions which told them the guilt of plaintiff in error must be proven beyond a reasonable doubt, and having found him guilty the question now is was the evidence sufficient to justify a verdict and will it sustain such verdict.

It is respectfully submitted that under all of the authorities very slight circumstances, in addition to the fact that the property was stolen, and in the possession of a defendant will be held to sustain a verdict.

See authorities *supra*.

It was for the jury to say whether the circumstances proven by the evidence were sufficient to show a guilty knowledge on the part of plaintiff in error, and having so found from the facts this court will not disturb the verdict.

We respectfully submit that a most careful examination of the evidence by this court will disclose a case made out that justified the conviction.

## FAILURE OF RECORD TO AFFIRMATIVELY SHOW ARRAIGNMENT OR PLEA.

Plaintiff in error, in the last subdivision of his brief herein, states that the record in this case “fails entirely to show, affirmatively that plaintiff in error was either arraigned or pleaded to the indictment.” He then proceeds to argue that, by reason of such failure of the record to affirmatively show these facts, the judgment should be reversed and the case remanded for a new trial—this in spite of the fact that there is no assignment of error covering this proposition. It is evident that this contention is made solely in hopes that the rule laid down in the case of *Crain vs. U. S.* 162 U. S. 625, and *Shelp v. U. S.* 81 Fed. 694, will be held to apply in this case and a reversal be secured by virtue thereof.

We concede the rule, under the cases, *supra*, to be that when the record is barren of anything showing that a plea has been entered, the judgment is a nullity. But have we a case similar to the cases above cited?

In the *Crain* case, *supra*, the supreme court of the United States said the facts were as follows:

“The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn ‘to try the issue joined’, and from the

statement in the bill of exceptions that the jury were 'sworn and charged to try the issues joined.' What that issue was is not disclosed by the record."

This court, in the *Shelp* case, *supra*, in commenting on the facts, said:

"The bill of exceptions shows 'that the issue joined in the above stated case between the said parties came on to be tried before said judge and the jury which was duly impaneled and sworn to try the issues between the said parties.' "

The above were the facts existing in those cases, but, in the case at bar, we have an entirely different record. The judgment, on pages 15 and 16 of the record, herein, reads as follows:

"The United States Attorney with the defendant and his counsel present in court.

"The defendant was duly informed by the court of the nature of the charge against him, \* \* \* \* and of his indictment, arraignment and plea of not guilty as charged in said count one of the indictment." &c.

These recitals in the judgment are solemn recitals of certain facts that the trial court found to exist at the time judgment was entered. They are not orders of the kind that were present in the *Crain* case, *supra*, or recitals such as were contained in the bill of exceptions in either the *Crain* or *Shelp* cases, *supra*. Can it be said that the statement of such facts as are contained in the judgment herein are false. Counsel



for plaintiff in error will, I am sure, concede that if such a recital was contained in a minute entry of the trial court that its truthfulness could not be questioned by him, unless he made a showing that it was actually false. How, then, can he be heard to question the truthfulness of such a recital in the judgment of the court itself?

Counsel for plaintiff in error admits that these recitals are in the judgment herein, but contends they are not the affirmative showing in the record that is required by the Crain and Shelp cases, *supra*. Unless this court holds that these recitals are of no force and effect, are meaningless, that a judgment shows nothing affirmatively but the penalty imposed thereby, the contention of plaintiff in error, that the judgment should be reversed because of what he calls a lack of an affirmative showing in the record that a plea was entered, is untenable.

The supreme court of the United States, in the case of *Pointer v. U. S.*, 151 U. S. 419, held:

“While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, ‘all parts of the record are to be interpreted together, effect being given to all, if possible and a deficiency at one place may be supplied by what appears in another.’ 1 Bishop Crim. Proc. §§ 1347 1348.”

There is nothing in the case of *Crain v. U. S.*, *supra*, that changes the holding in the *Pointer* case,

*supra*, for in the Crain case the record was absolutely silent of any recital of the steps taken throughout the proceeding as are required to sustain a judgment of conviction.

It has been held that in a criminal case the record in the trial court will not be interpreted to show error if it is susceptible of a reasonable interpretation to the contrary.

State v. Durein 70 Kan. 1, 78 Pac. 152,  
affirmed on rehearing;

70 Kan. 13 80 Pac. 987;

also affirmed in

Durein v. State, 208 U. S. 613.

A recital, in a judgment of conviction of homicide, that accused was arraigned, and pleaded not guilty, is sufficient on appeal.

West v. State, 40 Tex. Cr. R. 148, 49 S. W. 95.

Villereal v. State (Tex.), 61 S. W. 715.

Watts v. State (Ala.), 39 So. Rep. 455.

In the case of Villereal v. State, just cited, it was held that such a recital in the judgment was conclusive on appeal.

See, also:

Jackson v. State, 142 Ala. 55, 37 So. Rep. 920,  
where it was held that when a judgment affirmatively shows that issue was joined on a plea of not guilty,

such recital in the judgment excludes any assumption that issue was joined on a plea in abatement to the affidavit on which defendant was arrested and tried, the record showing no disposition of such plea in abatement.

Inasmuch as the judgment itself, in the case at bar, affirmatively shows all the necessary and requisite steps, to which plaintiff in error was entitled in the trial court, it is respectfully submitted that the rule enunciated in the Crain and Shelp cases, *supra*, does not apply.

In conclusion, we most respectfully submit that the case at bar is one in which defendant has been given every opportunity to defend himself and has not been deprived of any constitutional right. The record is barren of any error whatsoever and the contentions of plaintiff in error that he was not speedily or properly tried and convicted are merely imaginary wrongs that do not exist and are only the result of serious after thought on the part of his counsel in an endeavor to prevent the law taking its course.

B. K. WHEELER,

*United States Attorney, District of Montana.*

HOMER G. MURPHY,

*Assistant U. S. Attorney, District of Montana.*



2320

IN THE

## U. S. Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM STEWART,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

## BRIEF OF PLAINTIFF IN ERROR

BENTON DICK,

Attorney for Plaintiff in Error.

Filed this \_\_\_\_\_ day of \_\_\_\_\_ 1913.

FILED  
By \_\_\_\_\_ Clerk,  
Deputy Clerk.

JUL 10 1913





IN THE  
U. S. Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT

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WILLIAM STEWART,	}
Plaintiff in Error,	
vs.	
UNITED STATES OF AMERICA,	
Defendant in Error.	}

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**Brief of Plaintiff in Error.**

William Stewart, the plaintiff in error, was jointly indicted with one John B. Goodwin, on the 16th day of May, 1911, by the Grand Jury of the United States, within and for the Fifth Judicial District of the Territory of Arizona, for the crime of murder committed upon the person of one Fred Kibbe. A severance was demanded by the plaintiff in error and he was ordered tried separately. The indictment was transferred to the United States District Court for the District of Arizona, by the admission of the Territory into the Union. Plaintiff in error was tried by a jury which

returned a verdict of guilty of murder of the first degree without any qualification and he was sentenced to be executed on the 1st day of August, 1913.

From the judgment and order of the United States District Court for the District of Arizona, overruling defendant's motion for a new trial, the case is brought to this Court upon a writ of error.

### **Statement of the Case.**

It appears from the evidence on behalf of the United States, that one Fred Kibbe and one Alfred Hillpot were shot and killed on the 15th day of September, 1910, at a place commonly known as Tuttle's Station, upon the White Mountain Indian Reservation, in the county of Gila, in the Territory of Arizona. That William Stewart, the plaintiff in error herein, and one John B. Goodwin, had been living in the house at Tuttle's Station, where the murder was committed, for some time prior to the commission of the offense. That Stewart and Goodwin disappeared on the night of the murder and were trailed by the officers to a point in the Northern part of the Territory where they were placed under arrest several days later and that upon being searched they were found to have in their possession certain articles of personal property belonging to the dead men. That Stewart and Goodwin were immediately asked by the officers why they killed Kibbe and Hillpot and Stewart replied that they had a fight over a dog; that they had to do it and that it was in self-defense. Other witnesses for the government testified that similar statements were made by Stewart while he was confined in jail at Globe.

Plaintiff in error, testifying in his own behalf, denied that he killed Kibbe or Hillpot, or that he had anything to do with it further than to take from the person of Hillpot a pocketbook and that this was done under Goodwin's direction, after the murder was committed, and that he was forced to do this by reason of fear of bodily harm from Goodwin who was armed. Plaintiff in error denied making the statements attributed to him by the officers at the time of his arrest. He admitted making statements in jail in substance as stated by the different witnesses for the government; but said that Goodwin made up the story and induced him to tell it and stated that it was intended as a joke.

The record discloses the fact that numerous errors were committed in the admission and rejection of evidence; in the instructions of the Court; and prejudicial statements of the United States Attorney, which were incompetent and improper and by reason of which his substantial rights were prejudiced.

### **Assignment of Errors.**

#### **(I.)**

The Court erred in instructing the jury as follows:

"The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt and a fact for your consideration."

Reporter's transcript, p. 493.

## (II.)

The Court erred in admitting in evidence, over defendant's objection, a certain map (plaintiff's Exhibit "M") without proof of its accuracy or authenticity.

Reporter's transcript, pp. 275, 276.

## (III.)

The court erred in overruling defendant's objection to the empaneling of certain jurors summoned upon a special venire, whose names were not delivered to defendant at least two days before the trial.

Reporter's transcript, p. 92.

## (IV.)

The Court erred in permitting the witness for the government, John W. Shafer, to testify, over defendant's objection, as follows: "I should say from my knowledge of the Indian, to the best of my belief that the defendant is not an Indian."

Reporter's transcript, p. 346.

## (V.)

The court erred in permitting the United States Attorney to make the following remarks at the close of his opening statement to the jury:

"We will ask you to reach a verdict of guilty and affix the death penalty on this young man as has been done on his partner in crime."

Reporter's transcript, p. 136.



## (VI.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

“Q. Did you have a letter from John B. Goodwin telling you that he had deserted and that he was at Angel Island and had deserted from there and that he wanted to come to Tuttle’s Station?”

“A. I don’t understand the question. I had a letter stating ——”

“Q. Did you receive a letter?”

“A. Yes, sir.”

“Q. Have you got it?”

“A. No, sir.”

“Q. What became of it?”

“A. It was destroyed.”

“Q. State what the letter said.”

“A. He said that he was coming.”

Reporter’s transcript, pp. 388, 389.

## (VII.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

“Q. Was he (Goodwin) a deserter from the United States Army at that time if you know?”

“A. I didn’t know positively that he was a deserter, no sir.”

"Q. He told you that he was?"

"A. Yes, sir."

Reporter's transcript, p. 390.

(VIII.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

"Q. "But did he suggest to you, did he to kill those two boys?"

"Q. What did you say?" "A. I told him that I didn't want anything to do with anything like that at all."

"Q. You were not very much surprised when he suggested to you to murder those boys?"

"A. Well, no sir."

"Q. He was rather in the habit of doing that to you wasn't he?" "A. Yes, sir."

"Q. How many times before that had he suggested to you, as you say, to kill other people that were through and around that camp where you were harboring this deserter?" "A. I don't know. Three or four times."

"Q. Didn't you think that was rather extraordinary for a man to suggest to you to murder people who came around there?"

"A. I didn't think the man would do anything like that."

"Q. You didn't think he meant it; he did mean it, didn't he?" "A. Probably he did mean it."

Reporter's transcript, pp. 391, 392, 393.

(IX.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error, over his objections, as follows:

"Q. What did Goodwin say to you about murdering Bill Tuttle; what did Goodwin say to you?" "A. He said something about killing Mr. Tuttle."

"Q. Did you tell Bill Tuttle about it?" "A. No, sir."

"Q. Why didn't you tell Bill Tuttle?" "A. I don't know why I didn't tell him."

"Q. You don't know; why didn't you put him on his guard that you were harboring a man like that around his ranch?" "A. I didn't think there was anything to it. I didn't think Goodwin would do anything like that."

Reporter's transcript, pp. 393, 394.

(X.)

The Court erred in sustaining the objection of counsel for the government to the question: "How did you come to see the guns and ammunition?" propounded by counsel for plaintiff in error to the witness, Stewart, after counsel's avowal that he expected to prove that whatever Stewart did was under coercion by Goodwin.

Reporter's transcript, pp. 368, 369.

### ARGUMENT.

#### Assignment No. I.

This assignment is based upon error in instructing that the flight is evidence of guilt.

Reporter's transcript, p. 493.

This instruction is erroneous and misleading and we do not believe the qualifying words, "and a fact for your consideration" remedy the evil. The words, "the flight of the defendant with Goodwin from the place of the murder is also evidence of guilt", stand out in bold relief and completely overshadow the qualifying words. It is virtually an instruction that as a matter of law the defendant is guilty of the offense charged in the indictment if he fled from the place of the murder and it is quite reasonable to assume that the jury so understood it. The average juror is not capable of drawing nice distinctions.

That this instruction conduced to the conviction of

the defendant and prejudiced his substantial rights, it seems to us there can be little question. The province of the jury was invaded by the Court. The jury was bound to follow the instructions of the Court, even though erroneous, and in doing so would necessarily find the defendant guilty, because there was evidence before them that he had fled. In other words: the Court passed upon both the law and the facts. The jury has the sole power to determine the facts and that power was, in this case, usurped by the Court.

The defendant might as well have submitted the question of his guilt or innocence to the Court sitting without a jury.

It has been repeatedly held that flight of the accused raises no presumption of law that he is guilty; but it is a fact which may be considered by the jury and from which an inference may be drawn, in connection with other circumstances, that he is guilty.

Starr vs. U. S., 164 U. S. 627 (L. Ed. 41, 577.)

Allen vs. U. S., 164 U. S. 492 (L. Ed. 14, 528.)

Alberty vs. U. S., 162 U. S. 499 (L. Ed. 40, 1051.)

Hickory vs. U. S. 160 U. S. 408.

In the Starr case, above cited, the United States Supreme Court held that an instruction that flight raises a presumption of guilt and is a silent admission that the defendant is unable or unwilling to face the case against him, was erroneous.



In the *Alberty* case, also above cited, the United States Supreme Court held that it was misleading for the Court to charge the jury that, from the fact of absconding they might infer the fact of guilt, and that flight is a silent admission by the defendant that he is unable to face the case against him.

In the *Hickory* case, also cited above, the same Court held that one of the instructions (with which we have no doubt the Court is more familiar than counsel, and which we will not quote at length) was "tantamount" to saying to the jury that flight created a legal presumption of guilt.

In the *Allen* case, also above cited, the United States Supreme Court held that the flight of an accused person is competent evidence against him, as having a tendency to establish his guilt.

Therefore, the law seems to be well settled that flight does not raise a legal presumption of guilt, nor is it even a fact from which guilt may be inferred for, as the Court said in the *Alberty* case: "It lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt."

But, in the case at bar, the Court goes even further than did the trial Court in either of the cases above cited, all of which, excepting the *Allen* case, were reversed, and says, not that flight raises a presumption of guilt, or that the defendant's guilt may be inferred from the fact of his flight; but says: "The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt——"

The Court does not give the defendant the benefit of an instruction that: "the flight of the accused is competent evidence against him, as having a tendency to establish his guilt," thereby leaving the jury to determine the weight to be attached to the evidence; but on the contrary, virtually instructs the jury that the defendant is guilty because he fled.

### **Assignment No. II.**

This assignment is based upon error in the admission of a certain map without proof of its accuracy or authenticity.

Reporter's transcript, pp. 275, 276.

The map in question was offered in evidence for the purpose of proving that Tuttle's Station was situated upon the White Mountain Indian Reservation. It was essential to establish that fact in order to give the United States jurisdiction.

Where the question of jurisdiction is involved, as in the case at bar, a map, in order to be admissible should be proved to be correct and to accurately represent the boundaries of the territory in question.

"Maps are not independent evidence, and are only competent and material in so far as they are shown to be correct by other testimony in the case."

Johnston vs. Jones (U. S.) 17 Law. Ed. 117.

The evidence introduced in this case to establish jurisdiction was not the best evidence of which the

case in its nature was susceptible. It would seem to us that the best evidence would be the proclamation, or executive order, setting apart the land as a reservation and defining the boundaries. This, together with a correct, and official map or plat, showing the locality where the crime was committed would be the best evidence.

It is true that certain witnesses for the government testified that Tuttle's Station was on the White Mountain Indian Reservation; but it was not shown that they had the means of knowledge of that fact. It was hearsay and does not come within any of the exceptions permitting such evidence.

This case is distinguished from the case of *Holt vs. U. S.*, 218 U. S. 1021, where a witness for the government testified that certain barracks were within the enclosure of Fort Worden, under military guard and control and that the fence was coincident with the boundaries shown on a map in the Engineer's Department, made from original surveys of the War Department.

In the case at bar the jurisdictional question is of the utmost importance for the reason that the plaintiff in error had previously been convicted of killing Fred Kibbe, in the District Court of the Fifth Judicial District, of the Territory of Arizona, and sentenced to life imprisonment, upon the theory that the Territory had jurisdiction.

**Assignment No. III.**

This assignment is based upon error in empaneling and swearing certain trial jurors whose names were not delivered to defendant at least two days before the trial of the case.

Reporter's transcript, p. 92.

Section 1033, Revised Statutes, U. S. provides that . . . . . "when any person is indicted for any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."

It was held in *Logan vs. U. S.*, 144 U. S. 263, that: "The provision is not only directory, but mandatory to the government; and its purpose is to inform the defendant of the testimony he will have to meet, and to enable him to prepare his defense."

If the provision is mandatory as to witnesses it certainly is as to jurors, and for the same reason. The defendant has the right to know the names of the jurors and their place of residence in order that he may properly prepare his defense by investigating their character and standing; their religious and political affiliations, and their business and social associations, that he may properly and intelligently interrogate them as to their fitness to serve as jurors. These matters cannot, as a rule, be developed by a general line of questions such as counsel would be able to formulate in the space of a few moments. This applies with still greater force in Federal cases where the jurors are

drawn from the entire district and not from one county only as in state cases.

Counsel for the government may argue that it would be impracticable to take an adjournment for two days after beginning the trial of the case, for the purpose of summoning special veniremen after giving the statutory notice; but we submit that this is not a question of expediency but that of a substantial right, the violation of which deprived him of a fair and impartial trial.

#### **Assignment No. IV.**

This assignment is based upon error in permitting a witness for the government to testify, over defendant's objection, that from his knowledge, gained by observation of defendant, that he was an Indian.

Reporter's transcript, p. 346.

It has been held that it may be shown, by general reputation, that a person is a member of a particular race, and "that the evidence is good for what it is worth. As a matter of course it is worth hardly anything in a doubtful case."

Reed vs. State, 16 Ark. 256.

Locklayer vs. Locklayer, 35 Southern 1008.

#### **Assignment No. V.**

This assignment is based upon error in permitting the United States Attorney to state to the jury, in sub-



stance, that defendant's partner in crime (Goodwin) had been convicted of the same offense and sentenced to death.

Reporter's transcript, p. 136.

This statement was manifestly improper and tended to prejudice the defendant in the eyes of the jury by alluding to the fact that Goodwin had been convicted and sentenced to death. Such evidence was not competent, material or relevant, under any theory of the case, and it would have a natural tendency to create bias and prejudice in the minds of the jurors, leaving a feeling that the defendant should be made to follow in the footsteps of Goodwin.

It is true that the learned trial judge promptly ordered the statement stricken from the record; but it requires something more than mere admonition to strike the impression made by such statements from the minds of the jurors. It is entirely within the range of probabilities that had the jury not known of Goodwin's conviction and sentence to death, they would not have fixed the penalty at death even though they returned a verdict of guilty in this case.

A new trial will be granted, in a criminal case, where the district attorney, during the trial, made improper remarks calculated to prejudice the defendant's case with the jury.

Laubach vs. State, 12 Tex. App. 583.

The Supreme Courts of several states have gone so far as to hold that where the remarks of an attorney

are of such a character that neither rebuke nor de-traction can entirely destroy their influence, a new trial should be granted, even though no objection was made, or exception taken.

Chicago R. R. vs. Kellog, 55 Neb. 748 (76 N. W. 462.)

Kansas City Southern R. C. vs. Murphy, 74 Ark. 256, 85 S. W. 428.

Gawn vs. State, 7 Ohio Cir. Dec. 19.

The general rule is that improper statements and conduct upon the part of the district attorney in a criminal prosecution warrant a reversal of a conviction therein, where it can be seen that they might have been the means of procuring a verdict of guilty.

Heller vs. P. (Colo.) 43 Pac. 24.

Raggio vs. P. (Ill.) 26 N. E. 377.

P. vs. Fielding (N. Y.) 46 L. R. A. 641.

### **Assignment Nos. VI, VII, VIII, IX.**

These assignments, which will be considered under one head, are based upon error in permitting counsel for the government to cross-examine plaintiff in error relative to immaterial matters and which were gone into upon direct examination.

It has been held that the cross-examination of a witness must be limited to the matters stated on direct examination, except where questions are asked

to test the credibility of the witness, or his means of knowledge, or to lay the foundation to admit evidence of prior contradictory statements.

Houghton vs. Jones, 1 Wall, 702, 17 Law. Ed. 503.

Wills vs. Russell, 100 U. S. 621, 25 L. Ed. 607.

Phila. & T. Co. vs. Stimson, 14 Peters, 448, 10 L. Ed. 535.

Rea vs. State of Missouri, 21 Law. Ed. 757.

There are other exceptions to the rule, than those above mentioned, to which we do not deem it necessary to call the attention of the Court; and we submit that the cross-examining questions complained of do not come within any of the exceptions to the rule that the cross-examination of a witness must be limited to matters stated on direct examination.

That this line of examination was improper and that it prejudiced the defendant in the eyes of the jury, there can be very little question.

### **Assignment No. X.**

This assignment is based upon error in sustaining an objection to a question by counsel for defendant, after an avowal that he expected to prove that Stewart acted under coercion by Goodwin.

Reporter's transcript, pp. 368, 369.

We desire to call the attention of the Court to the fact that, owing to circumstances over which we

had no control, to-wit: The failure of the court reporter to complete the transcript of the evidence within the time allowed by law to file the writ of error, not all of the errors complained of were assigned; and we respectfully request that the Court consider the errors assigned in our brief, under the rule which provides that the court may notice plain error not assigned.

The question of whether plaintiff in error actually committed the offense charged in the indictment, is not before the Court at this time; the question being, not that of his innocence or guilt, but whether or not he had a fair and impartial trial. The record discloses at least a reasonable doubt on that question. All that plaintiff in error has on this earth—his life—is at stake, and we urge that he is entitled to the benefit of the doubt.

We submit that plaintiff in error did not have a fair trial and that the judgment of the trial court should be reversed.

Respectfully submitted,

BENTON DICK,  
Attorney for Plaintiff in Error.

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WILLIAM STEWART,  
Plaintiff in Error,  
vs.  
THE UNITED STATES  
OF AMERICA,  
Defendant in Error.

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**Brief of  
Defendant  
in Error.**

It is contended by counsel for the plaintiff in error that the Trial Court erred in its charge to the jury upon the subject of the flight of the defendant. The instruction in question is as follows:

“The defense of Stewart is that he did not kill Kibbe, and did not participate in the commission of the crime by any act of his own, or by any agreement, plan, or understanding with Goodwin. The defendant admits that he participated in the robbery of the bodies of Hillpot and Kibbe. The statute provides that the killing of a human being committed in the perpetration of or attempt to perpetrate a robbery is murder. The fact of robbery is therefore a direct admission for your consideration. The flight of the defendant with Goodwin from the place of the murder is *also* evidence of guilt and a fact for your consideration.



The only answer the defendant makes to these admitted facts is that he was compelled by Goodwin to do as he did. Is this answer sufficient in the light of all the events and surrounding circumstances? *This is the question you are called upon to answer by your verdict."*

Error is assigned for the reason that the Trial Court instructed, as appears above, that "the flight of the defendant \* \* \* is also evidence of guilt." Substantially the same language is approved in the case of *Allen vs. United States*, 164 U. S. 492, 41 Law Ed. 528 (R. P. 530). In that case the lower Court instructed the Jury as follows:

"Now, then, you consider his conduct at the time of the killing and his conduct afterward. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration *against* him, because the law says that unless it is satisfactorily explained,—and he may explain it upon some theory and you are to say whether there is any effort to explain it in this case,—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience that teaches us to know whether we have done right or wrong in a given case."

"Indeed the law is well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt."

Wharton on Homicide. Paragraph 710.

People vs. Pitcher, 15 Mich. 397.

The Supreme Court of the United States cites the last quoted authority in connection with the instruction last above referred to, and says:

"This was the substance of the above instruction, and although not accurate in all its parts we do not think it could have misled the jury."

Allen vs. U. S. Id.

The identical language used by the Trial Court in the case at bar is quoted with approval in the case of Hickory vs. U. S., 160 U. S. 406-408, 40 Law Ed., 474 (R. P. 478-9):

"In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely that of a circumstance, a *fact* which it is always of importance *to take into consideration*, and combined with others may afford strong *evidence of guilt x x.*"

"It is true that a subsequent portion of the charge refers to the evidence on the subject of concealment as 'proper to be taken into consideration, as evidence of guilt,' as going to show guilt. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury."

Hickory vs. U. S. Id.

It thus appears that, while the instruction in the last cited case was held erroneous, the Supreme Court did not reach this conclusion because of the fact that the Trial Court in that case instructed the jury that the evidence was proper to be taken into consideration as *evidence of guilt*, but, on the

contrary, this language is approved, as appears from the above quotation. The Court in that case had instructed the jury substantially, that the mere fact that the defendant fled, of itself demonstrated his guilt. The attention of the Court is respectfully directed to the exact language of the Trial Court in the case at bar with reference to the statement that the flight of the defendant is evidence of guilt. It will be noted that the learned Judge states that the flight of the defendant, which was admitted and testified to by him, was *also evidence of guilt* and a fact for the consideration of the jury, thereby saying to the Jury actually and in effect that the flight was but one portion of evidence of their consideration, the same as any other fact or portion of evidence introduced by the prosecution. The Jury was later advised, in the same instruction, by the Lower Court that the defendant had attempted to explain the flight, and that they were to determine whether the explanation was sufficient. In our judgment, every portion of the evidence introduced by the prosecution in any criminal case, with the exception of formal matters, is evidence of the guilt of the defendant. The very purpose and duty of the prosecuting officers in presenting a case against any defendant is to introduce evidence of the guilt of the defendant.

The Lower Court specifically advised the jury, as appears from the careful and accurate wording of the instruction, that the flight of the defendant, while evidence of guilt, is not sufficient of itself to justify the jury in returning a verdict of guilty, nor does it even go to the extent of saying that the flight of the defendant raises a presumption of his guilt. It states the law in a terse, succinct and able manner, advising them that the flight of the defendant is

evidence which they should take into consideration, and it must be observed that the defendant had admitted that he did fly from the scene of the homicide. It also submits to the jury in the same instruction that the defendant had offered an explanation and then advises the jury that this explanation is for their consideration, as well as the admitted flight, and it is for them to say, under all of the circumstances, whether they believe the explanation or not. If they do not believe the explanation, then there can be no question whatever but that the flight of the defendant, under all of the circumstances in this case, replete as it is with hideous, shocking and brutal details, was positive evidence of the guilt of the defendant.

The second assignment of error avers that the Court erred in admitting into evidence over defendant's objection a certain map, namely Plaintiff's Exhibit M, without proof of its authenticity. Attention is invited to Page 275 of the Transcript of the Reporter's notes. It there appears that objection was made to the introduction of the testimony of one John D. Adams, Chief Clerk of the United States Surveyor General's Office, for the reason that his name was not furnished to the defendant at least two days before the trial of this case. The United States Attorney conceded that the objection was well taken, and the Court sustained the same. Thereupon the United States Attorney offered the map in question, which shows upon its face that it was made in the Department of the Interior and General Land Office of the United States, and bears the name of the Commissioner of the General Land Office. Defendant's counsel then made the following objection:

"We object to the introduction of the map for the

same reason and upon the same ground."

The objection immediately preceding the one last mentioned is the one directed to the examination of the witness. Surely the defendant's counsel cannot contend that the government should have furnished the map to him at least two days before the trial! There is no statute or rule of practice which requires such action. Therefore, no objection at all on the face of the record was made to the introduction of the map. This objection was overruled by the Court and defendant excepted. Thereupon defendant's counsel entered into a colloquy with the Court, but made no motion to strike, nor any specific objection. The only method by which he could, after the introduction of the map, seek to eliminate it from the record, was by motion to strike, which he did not attempt. However the learned trial judge stated:

"The map is in the Department of the Interior, General Land Office, I rule that that is sufficient as a public document."

The map of itself imported verity. It purported to be made in the General Land Office, within the Department of the Interior, and to have been compiled from the official records of that office and other sources. It is a printed copy and the work of the official printing office of the United States. In this connection it has been said:

"In general then where an official printer has been appointed, his printed copies or official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, or that he should be exclusively concerned with official work, x x x, as for authentication of his copies, it is



enough that the copy offered *purports to be printed* by authority of the government; its genuineness is then assumed without further proof."

Wigmore on Evidence, and cases cited. Vol. 3 Mar. 1684, P. 2157.

It is a well settled principle of law that every officer is presumed to do his duty and that his acts are authorized by law, and this presumption exists until the contrary appears. The map in question appears on its face to have been compiled under the supervision of the Commissioner of the General Land Office of the United States, and he, as any other officer, is presumed to be acting with authority until otherwise shown.

Plaintiff in Error's third assignment is that the Court erred in overruling defendant's objection to the impaneling of certain jurors summoned upon a special venire, whose names were not delivered to defendant below at least two days before the trial. Section 1033 of the Revised Statutes of the United States provides, in effect, that when any person is indicted for a capital offense, other than treason, a copy of the indictment, together with a list of the jurors and all of the witnesses to be produced on the trial for proving the indictment, stating the abode of each juror and witness, shall be delivered to him at least two entire days before the trial. Strict compliance with this statute was had. The names and places of residence of all jurors upon the panel then in attendance upon the court were served upon the defendant more than two days before the trial. It appears that quite a large number of jurors were disqualified upon their examination on their *voir dire*. The panel was exhausted and, in order that the trial might proceed with the

requisite number of jurors in the jury box, as required under the practice of the State of Arizona, to wit, thirty eight, the Court ordered that a special venire issue. The Plaintiff in Error contends that the Government should be required to perform an impossibility. It was utterly impossible to serve a list of the names and residences of the jurors who were summoned on the special venire upon the defendant, two days prior to the commencement of the trial. That his position is untenable is self-evident.

• The judgment of the lower court should be affirmed.

Respectfully submitted,

J. E. MORRISON,

*United States Attorney for the District of Arizona.*

J. C. FOREST,

*Assistant United States Attorney for the District of Arizona.*

O. T. RICHEY,

*Assistant United States Attorney for the District of Arizona.*

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IN THE

# United States Circuit Court of Appeals

for the Ninth Circuit

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O. P. HALLIGAN, Warden of  
the United States Penitentiary  
at Bee, McNeil Island, Wash-  
ington, for the United States  
Government (Respondent),

*Appellant,*

*vs.*

JAMES A. MARCEL  
(Petitioner),

*Appellee.*

No. [REDACTED] 2024

In the Matter of the Application of James A. Marcel  
for a Write of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

## Brief of Appellant

CLAY ALLEN,

*United States Attorney*

E. B. BROCKWAY,

*Assistant United States Attorney*

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SMILEY LITHO. & PRINTING CO., 72 COLUMBIA ST., SEATTLE, WASH.

**FILED**

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O. P. HALLIGAN, Warden of  
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at Bee, McNeil Island, Wash-  
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Government (Respondent),

*Appellant,*

*vs.*

JAMES A. MARCEL  
(Petitioner),

*Appellee.*

---

No. 1416.

In the Matter of the Application of James A. Marcel  
for a Write of Habeas Corpus.

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

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STATEMENT OF CASE.

The petitioner and appellee in this case is a  
United States convict in the United States Peni-  
tentiary at Bee, McNeil Island, Washington. The



respondent to the writ, and appellant, is the warden of such penitentiary.

A brief preliminary glance at the law is necessary to a proper understanding of the facts of this case.

Section one of the act of June 21, 1902 (32 Stats. at Large, 397), provides that each prisoner

“who had been or who shall hereafter be convicted of any offense against the laws of the United States, and is confined in execution of the judgment or sentence upon such conviction in any United States penitentiary \* \* \* for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not ben subjected to punishment, shall be entitled to a deduction from the term of his sentence,” etc.

On June 25, 1910 (36 Stats. at Large, 819), Congress passed a further act providing for the parole of United States prisoners who have a good record of conduct. This parole is dependent upon the exercise of a reasonable discretion by a board of parole authorized by the act. Section two of the act provides that the prisoner shall be released upon parole

“upon such terms and conditions, including personal reports from such paroled persons as said board of parole shall prescribe, and to remain while on parole in the legal custody and under the control of the warden of such prison

from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by act of Congress."

Section ten of the act provides

"that nothing herein contained shall be construed to \* \* \* in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

Hereafter in this brief such acts will be referred to as the commutation act and the parole act.

On May 3, 1909, the petitioner and respondent, after conviction of a violation of the National Banking act, was sentenced by the United States District Court for the Eastern District of Washington, to serve five years in the United States Penitentiary at McNeil Island, Washington. Service of this sentence commenced May 13, 1909. On August 12, 1911, the petitioner was released on parole in accordance with the act of June 25, 1910. Counting at the rate of 8 days per month deduction from sentence for good behavior, being the rate allowed by act of June 21, 1902, as amended by act of April 27, 1907, the petitioner's sentence, at the time of his parole, was reduced to the extent of 216 days. Petitioner was out on parole for 230 days, or until

March 29, 1912, when he was returned to the penitentiary for violation of his parole, where he has since been confined. All the above facts are pleaded in the petition for the writ, paragraphs 3, 4, 5, 6 and 7, and are admitted in the return to the writ, paragraph 1. (Typewritten Record, pp 3, 9.) The violation of the parole consisted of cohabitation with another man's wife. (Cross-examination of Mr. Halligan, Typewritten Record, p. 27.)

It appeared at the trial that the prisoners were furnished two books or pamphlets. The first contained the act of June 21, 1902, providing for commutation of sentence for good behavior; also the act providing for parole (act of June 25, 1910), and the "rules and regulations for the government and discipline of the prisoners in the United States Penitentiary at McNeil Island, Wash." The rules contain no reference whatsoever, either to the conduct of the prisoners on parole or to the effect of a violation of parole, but are solely directed to the conduct of the prisoners while confined in the penitentiary. (Petitioners' Exhibit No. 1, Typewritten Record, p. 30.) The second book, given to the prisoner when the parole is granted, contains not only

the parole act, but the rules of the board of parole. These rules nowhere directly mention the effect an infraction thereof may have on commutation of sentence for good behavior, but Rule, 28, contained therein, states that the parole will be granted only on the express condition that the prisoner "will in all respects conduct himself honorably \* \* \* and that he will live and remain at liberty without violating the laws." (Petitioner's Exhibit No. 2, Typewritten Record, p. 31.) The parole was revoked for the violation of this rule in the manner above set forth. (Testimony of Mr. Halligan, Typewritten Record, p. 27.)

Some 7 months after the prisoner's return he was handed a slip by the warden, in which his good conduct term was stated to expire on April 8, 1914, and further stating, on the back thereof, that all good time from beginning of sentence to date of release on parole was forfeited on account of the violation of parole; that no good time was earned during the parole on account of the violation thereof, and that good time was computed from March 29, 1912, being the date of the return to the penitentiary after the violation of parole. (Petitioner's Exhibit No. 3, Typewritten Record, p. 32.)

Mr. Halligan, the respondent, was not only warden of the penitentiary, but also president pro tem of the board of parole. In the cancellation of good time noted on the slip above set forth, he acted in his capacity as warden. (Testimony of Mr. Halligan, Typewritten Record, p. 27.)

On September 8, 1913, petitioner filed his petition for a writ of habeas corpus, in the United States District Court for the Western District of Washington, claiming that his confinement since September 4, 1913, had been in violation of law, for the reason that he was still entitled to the 216 days' good time allowance which had accrued when he was released on parole. (Petition, paragraphs 2 and 10.) The answer alleged that the 216 days' good time allowance, by which the sentence had been diminished at the time of the parole, was forfeited and canceled by the violation of the parole. (Answer, paragraph 6.) The answer further alleged that the sentence of petitioner, under the law governing good time allowances, paroles, and the violation thereof, does not expire until 216 days from September 5, 1913, or on April 8, 1914. (Answer, paragraph 6.)

The parole act provides that, on revocation of



parole, the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (Parole act, section 6.) Bearing this in mind, it is evident that the time fixed by respondent for the expiration of petitioner's sentence is obtained by deducting from the five-year sentence 8 days per month for the total sentence, less the 216 days' good time allowance claimed to have been forfeited by violation of parole, and adding the 230 days the prisoner was out on parole, as required by section 6 of the act, *supra*. The same result is obtained on the slip referred to, by allowing 8 days per month good time from the date of the return to the time when the sentence would otherwise expire, the 230 days of parole not, of course, being counted as served on the sentence. In other words, the petitioner is given full allowance for good behavior for the full five years of his sentence, except that 216 days of such allowance have been canceled by the respondent for the misconduct, breach of law, breach of rules, and punishment involved in the violation of petitioner's parole and his subsequent return to the penitentiary.

The court, after hearing the evidence, took the matter under advisement, and subsequently filed its

opinion (Typewritten Record, p. 14), and ordered the petitioner fully discharged from the custody of the warden. (Typewritten Record, pp. 20, 21.) This appeal having been taken from such order and decree, by the direction of the Attorney General, and the petitioner having been unable to give bond to answer the judgment of this court in the matter, he was again committed to the penitentiary, pending this appeal, under an order providing that, in case of reversal of the lower court, the time he should be so confined pending the appeal should be counted as served on his original sentence.

The errors assigned are all determined by the answer to this question:

Does such a violation of parole and revocation thereof, as shown in this case, justify, under the statutes, a cancellation of good time accrued at the time the parole started, and to which the convict would be otherwise entitled?

It is the contention of the appellant that the order and decree of the court is erroneous, in that it is necessarily based on a negative answer to this question.

## ARGUMENT.

The answer to the question just suggested requires a close examination of the statute.

Section one of the commutation act provides that a United States convict, confined in a United States penitentiary, whose record shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence. Section ten of the parole act provides that nothing contained in the act shall "in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress." The commutation act was approved June 21, 1902. The parole act was approved June 25, 1910.

It was the theory of the petitioner and of the learned District Judge, that the "rules" referred to in paragraph one of the commutation act are rules applicable to one actually "confined" in the penitentiary; that in view of section ten of the parole law such rules cannot be considered as covering also the rules governing a convict while on parole, and that this is rendered still more evident by the fact that the book of rules given the prisoner

on confinement, and touching his conduct while in prison, particularly Rules 86 and 93, tell the convict that a violation of such rules will forfeit his good time allowance, while in the book of parole rules no such statement is made as to the effect of violation of parole.

As to the effect of these features of the printed rules it is sufficient to remark that neither the silence of the parole rules as to the forfeiture of good time by a violation thereof, nor the statement in the prison rules that a violation thereof will forfeit good time, contains any element of estoppel whatsoever. If it is the law that a paroled prisoner will forfeit his good time theretofore accrued by a violation of his parole, and a further breach of the law, then it was not necessary for the government in its rules to warn thereof. The statement that a violation of the prison rules will forfeit good time cannot be tortured into a statement that nothing else will have a like effect. Both the commutation and the parole acts are acts of grace by the government, designed to restore the convict more speedily to law-abiding citizenship, and the rules drawn thereunder have plainly the same object in view. The statement in the prison rules is only a friendly

warning applicable to the matters there dealt with, and has nothing to do with the effect of a violation of parole.

The parole rules, as noted by Judge Cushman in his opinion, are general in their nature, and the rule forbidding a violation of the law of the land does not even contain a warning that a violation thereof will result in reimprisonment. No weight, therefore, can be attached to its further failure to warn that a violation of the law would also result in a forfeiture of good time earned. Both of such results of the violation are dictated not only by the law, but by the good conscience of the convict, and a warning, while it would have been proper enough, was entirely unnecessary.

If in truth the contention of petitioner were sound, that a violation of parole does not justify a forfeiture of good time accrued prior to the parole, then a statement in the rules that such an effect would follow would be of no effect whatsoever, as contrary to law. If, on the other hand, the warden's position is sound, then a failure to so state explicitly in the parole rules is entirely immaterial. The question reverts to the proper construction of the acts of Congress.



In constructing these statutes it must always be borne in mind that they are not penal statutes to be most strictly construed in favor of the convict or accused, but acts of mercy and of trust, intended to incite good behavior and redemption of character, not by punishment, but by confidence, and that as such they should receive a construction which will meet their letter, and at the same time carry out their purpose.

The commutation act then is one giving United States convicts an opportunity to shorten the term of their punishment by their own good behavior. In extending this act of clemency to the convict, the government has defined those to whom it shall apply. It is decreed that it shall be applicable to any convict whose "record of conduct shows that he has faithfully observed *all the rules*, and not been subjected to punishment." At the time this act was passed there was no parole act, and it was not of course necessary that the act should specify both prison and parole rules. Its language would naturally follow the conditions then existing. Nevertheless the language used was broad enough to include not only the rules then in force, or applicable to the condition of convicts under the existing laws,

but also any rule which might thereafter be passed, or which might become necessary owing to a changed condition of convicts under new laws. The condition of the commutation was that the convict should have obeyed *all* the rules.

Plainly the language is broad enough, and was meant, to require that a convict, before receiving his commutation, should have faithfully observed every rule governing him as a convict, no matter what position as a convict he might hold, and no matter how changed the rules might become in order to meet his changed condition as a convict, owing to new laws. Still the condition persists that before being entitled to a commutation he must have obeyed *all the rules*.

And in this connection it must be borne in mind that, by the direct provision of the parole act, a paroled convict is still a convict serving out his sentence, and subject to rules applicable to him, not as a free man, but as a paroled convict. Section three of the parole act expressly provides that a paroled prisoner shall still be "in the legal custody and under the control of the warden of such prison from which paroled." Being under such legal cus-

tody and control, he is of course subject to rules, not the rules governing him while in actual confinement, for they are no longer applicable, but none the less rules, a violation of which will show on his "record of conduct," and for breach of which he may properly be subjected to "punishment," the same as any other convict. The language "all the rules," particularly when taken in connection with the provision of the parole act leaving all paroled prisoners in the legal custody and control of the warden, so plainly requires a compliance with the parole rules, though first known after the passage of the act, as to be susceptible of no other construction.

But it is urged that section one of the commutation act refers to prisoners "confined" in a penitentiary, and that therefore the subsequent condition requiring compliance with "all the rules" must be understood as meaning only all rules applicable to a "confined" convict. The conclusion does not at all follow. In the first place, when the act was passed, all convicts except escapes were "confined," and the word was used, not to distinguish "confined" from paroled convicts, but as a part of a phrase defining the *terms* of convicts falling within

the act. The phrase, omitting irrelevant matter, is merely "confined for a definite term other than life." No "paroled," as distinguished from "confined," prisoners, being known to the law at the time the act was passed, and the word "confined" being merely used as a part of an apt phrase defining the terms of the convicts to whom the act was to apply, it would seem that even without the explicit provisions of the subsequent parole act, touching its effect on the commutation act, no inference could be drawn from the use of such term, that the commutation act, with all its limitations and conditions would not apply to a paroled as well as a "confined" convict. But in any event, the parole act itself, in section ten, plainly shows that the commutation act is not to be restricted to "confined" prisoners. Section three provides that the parole shall continue until the expiration of the term, "less such good time allowance as is or may hereafter be provided for by act of Congress." Section ten provides that nothing in the act shall in any way "impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

This last provision seems to have been considered by the learned District Judge as in some man-

ner mitigating against the position of the warden in this case. We fail to see how any such effect can be given it. The good time of the convict in this case was forfeited not under the parole act but under the commutation act itself. It might well be claimed that section six of the parole act, providing that on revocation of parole, the convict "shall serve the remainder of the sentence originally imposed," prevents a prisoner whose parole has been so revoked from receiving any good time whatsoever, either past or future. The language is certainly susceptible of such construction, but it is not necessary so to hold in this case, and the Department of Justice has not given the act this strict construction, preferring still to extend to the convict the privileges of the commutation act, by which, though his past good time has been forfeited by his misconduct, he may in the future gain other and further good time. It is, however, very plain that under the commutation act itself the good time already accrued was forfeited, and for a reason stated in the commutation act, to-wit, for a failure to observe "all the rules," and a subjection to punishment. The particular character of the rules arose of course out of a condition created by the



parole act, but it was the failure to observe the condition laid down in the commutation act itself which created the forfeiture of the commutation. The true intent of the provision of section ten is obviously to set at rest any possible question as to whether a paroled convict was entitled to the same good time allowance as though he were actually "confined" in the penitentiary. In other words, section ten of the parole act conclusively establishes the rule that a prisoner on parole is entitled to good time allowance. The combined effect of section one of the commutation act and section ten of the parole act is to provide that any United States convict, whether confined in a penitentiary or out on parole, whose record of conduct shows that he has not been subject to punishment and that he has faithfully observed all the rules applicable to him as a confined or paroled convict, shall be entitled to a deduction, etc. For, of course, as soon as it appears that the word "confined," in section one of the act, does not limit the operation of the act to prisoners actually in the penitentiary, then the words "all the rules," in conditions governing the application of the act, must be given an equally broad construction. The act applies to paroled as

well as to confined convicts, and therefore the rules, *all* of which must be obeyed, include the rules applicable to paroled as well as to confined convicts.

Aside from the above reasons, the forfeiture of the good time of the petitioner was justified by the requirement of the act that the convict shall not have been "subjected to punishment."

As already noted, it is provided in section three of the parole act, that the convict while on parole shall be in the legal custody and under the control of the warden. The convict is by no means a free man during the period of parole. He may be described as a "trusty," raised to the nth power. The bounds beyond which he dare not depart are the limits of residence fixed by the board (Parole Act, section three), instead of the walls of the prison or the limits of the convict quarry or farm. Instead of reporting each morning and evening at roll call, he must report at fixed times to those designated by the board. Instead of being obliged to govern his every act by the strict requirements of prison discipline, he is required to live an honorable and upright life, free of reproach to all men, and to avoid violation of the laws of the land. (Parole Act, section 28.) Instead of following the rigid require-

ments of the prison as to food and drink, he is required only to avoid the frequenting of saloons. These requirements are not onerous, but they are essential to the retention of his high standing as a convict on parole.

The division of convicts into classes, entitled to certain privileges in accordance with their behavior, is a matter of common knowledge, and is shown also by the prison rules introduced in evidence. One of the most frequent forms of punishment for misconduct is the demoting of a convict from a higher to a lower class, with the accompanying loss of privilege. Such punishment of a prisoner confined within the walls of a penitentiary is fixed by the rules governing his conduct while therein. The same punishment as to a paroled convict is determined by the parole act itself. The return of a convict to the penitentiary for violation of parole is a punishment of identical character with that inflicted upon the convict within the walls who is demoted for misconduct from a higher to a lower class. In each case the convict is "subjected to punishment." Thus it plainly appears that the petitioner in this case, when his parole was revoked for misconduct, was "subjected to punishment," and

comes within the exact terms of section one of the commutation act. By the express terms of the act, having been so subjected to punishment, he was no longer entitled to the good time which would otherwise have accrued to him.

The conclusion that good time earned prior to parole is forfeited by misconduct resulting in the revoking of the parole is not only in accordance with the terms of the act, as we have endeavored to show, but is also plainly within the spirit and purpose of the act. As we have already seen, the acts taken together plainly show Congressional intent that a prisoner behaving himself on parole should receive the same commutation of sentence as follows the good conduct of a prisoner actually confined within the walls. Good behavior on parole thus results in a shortening of the sentence. It is scarcely credible that it was the Congressional intent to allow a paroled prisoner a commutation of his sentence for good behavior while on parole, and at the same time do away with any forfeiture of such good time by misconduct while on parole. It would be illogical and absurd to give a paroled convict all the benefits of good behavior without at the same time depriving him of those benefits in case of misbehavior.

This argument seems so plain as to need no further elucidation.

The sustaining of petitioner's contention would result in a palpable injustice. Let us suppose another convict (called Convict A), sentenced for the same period, and whose term commenced on the same date as that of petitioner; either because Convict A was a second offender or because he seemed to need further restraint before being granted the privilege of parole, the parole board did not grant him such privilege, though at the time he had been guilty of no infraction of prison discipline and had earned the 216 days also earned by petitioner. The petitioner, we will say, on the 100th, instead of 230th day of parole, violated his parole by abusing the confidence reposed in him by the parole board and by a vicious violation of the laws of the land. Suppose on the same day Convict A violates such a prison regulation as would forfeit his good time theretofore earned. Such violation would almost necessarily be far less of an offense against society and the purpose of the government in the passage of the commutation and parole acts, than was the perfidious abuse of confidence constituting petitioner's violation of parole in this case. Nevertheless,



under petitioner's contention, Convict A would be deprived of all of his good time, while petitioner would be merely returned to the penitentiary, and with his sentence 116 days nearer completion than that of Convict A, who had been guilty of a far less offense, both morally and legally. The 216 days earned by petitioner prior to his parole would still be credited to him on his sentence. Giving him credit for this, and requiring him to serve at the close of his term the 100 days he had been on parole, he would still obtain his freedom 116 days earlier than his fellow convict who had been guilty of far less. And all this in addition to having had a 100 days' vacation from the restrictions of prison life. Such might well be the result of a violation of parole, and would in truth always be the result where the convict was out on parole a less number of days than he had earned good time prior to the parole. Certainly Congress never had any such unjust intent.

Furthermore, petitioner's contention is in violation of the spirit of the commutation and the parole acts. These acts are founded on the theory that the return to good citizenship may be most readily secured by extending clemency to those convicts who

show by their works a desire to re-establish themselves on the plane of good citizenship, and by exacting the full sentence from those convicts whose acts show a continued and perverse rebellion against the obligations resting upon members of civilized society. By these acts a convict is given the opportunity to choose for himself between mercy and a strict enforcement of his sentence. By his own good conduct he obtains the former; by his own misconduct he is left to suffer under the latter. To grant him the privileges of good conduct without depriving him of those privileges for misconduct is to defeat not only the letter but the spirit of the law.

So far as we have been able to ascertain, there are no adjudicated cases throwing any light on the question presented by this case. The question is one of statutory construction in a comparatively new branch of the law, and must be determined by the letter and spirit of the law rather than by the rule of *stare decisis*. We wish, however, to submit to this court the opinion of the Attorney General of the United States upon this very question. The opinion has not been published, and is addressed to Warden Halligan in response to a question from him touching the identical point now under dis-

cussion. While, of course, this opinion is not binding on the courts, we nevertheless wish to submit it to your attention as the judgment on this question of the chief official of that department of the government having to do with the enforcement of these acts, and also as the opinion of a distinguished lawyer and jurist. It summarizes in a few words what we have endeavored to express in this brief, and reads as follows:

“DEPARTMENT OF JUSTICE,

Washington,

October 21, 1912.

Warden, United States Penitentiary,

McNeil Island, Washington State.

Sir: For your information and guidance in cases of paroled prisoners returned to the penitentiary for violation of parole, you are advised that I have decided that a prisoner whose parole has been revoked by the Board of Parole on account of violation of the conditions of parole under Section 6 of the Act of June 25, 1910, forfeits such good time allowances as he may have earned under the provisions of the Act of June 21, 1902 (32 Stats. 397).

Good time allowance under that statute is granted to a prisoner

‘whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment.’

A prisoner who is liberated on parole is still, by virtue of Section 3 of the Parole Act,

‘in the legal custody and under the control of the warden of such prison from which paroled,’

and if he violates the conditions of his parole, the fundamental one of which is, as provided in Section 3 of the Act, that he

‘will live and remain at liberty without violating the laws,’

he certainly has not faithfully observed all the rules within the meaning of the Act of 1902 and is not, therefore, entitled to the good time deduction.

The provisions of Section 10 of the Parole Act to the effect that nothing herein contained shall be construed to

‘in any way impair or revoke such good time allowances as is or may hereafter be provided by Act of Congress,’

are not at variance with the construction, because the law authorizing the good time allowance itself

makes it dependent upon the faithful observance by the prisoner of all the rules.

(Signed) GEO. W. WICKERSHAM,  
Attorney General."

It thus appears, both by reason and by the only authority available, that the contention of the petitioner is not well founded, and that the law justifies, and indeed requires, the forfeiture of good time earned prior to parole, by such a violation of the parole as is shown by the records in this case.

We therefore respectfully pray that the judgment of the lower court be reversed, and that the petitioner be remanded to the custody of the warden of the United States penitentiary at McNeil Island, to serve the balance of his term.

Respectfully submitted,

CLAY ALLEN,

United States District Attorney,

E. B. BROCKWAY,

Assistant U. S. District Attorney,

*Attorneys for Appellant.*



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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE FEDERAL MINING & SMELTING COM-  
PANY, a Corporation,  
Plaintiff in Error,  
vs.  
C. H. HODGE,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Idaho,  
Northern Division.

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**FILED**  
NOV 18 1913



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE FEDERAL MINING & SMELTING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

C. H. HODGE,

Defendant in Error.

---

Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Idaho,  
Northern Division.

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**[Names and Addresses of Attorneys.]**

Messrs. FEATHERSTONE & FOX, Residence,  
Wallace, Idaho,

Attorneys for Plaintiff in Error.

Messrs. ROBERTSON & MILLER, Residence, Spo-  
kane, Washington,

WALTER F. MORRISON, Jr., Residence, Coeur  
d'Alene, Idaho,

Attorneys for Defendant in Error.

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*In the District Court of the United States for the  
Eastern District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Complaint.**

Plaintiff complains of the defendant and for cause  
of action alleges:

**I.**

That at all the times hereinafter mentioned the de-  
fendant was and now is a corporation created, or-  
ganized and existing under and by virtue of the laws  
of the State of New Jersey, and is a citizen of said  
State, and has complied with the laws of the State  
of Idaho relative to foreign corporations doing busi-

## 2    *The Federal Mining and Smelting Company*

ness therein, and owns and operates the Last Chance Mine, a silver and lead quartz mine at the town of Wardner, Shoshone County, Idaho, and that the plaintiff was at all of the times herein mentioned and now is a citizen and resident of the State of Idaho.

### II.

That on the 17th day of May, A. D. 1912, and for more than one month prior thereto, the plaintiff was and had been in the employ of the defendant as a mucker, on the fourth level of the Last Chance Mine about 450 feet from the "D" hoist, which is about 480 feet above the Sweeney level, and that in order to reach the workings in said mine where the defendant was engaged he was required to ride from [1\*] the Sweeney level to the said point in a skip, which was operated by a wire cable and hoist and upon steel rails from the Sweeney level to said place, the cable raising and lowering said skip being wound on a drum, which was a *part the* equipment constituting said hoist.

### III.

That on said date, and at or before the hour of 7:30 A. M., the plaintiff got into the said skip for the purpose of being hoisted to said level where he was engaged as aforesaid, and by reason of the negligence and carelessness of the defendant in failing to maintain an indicator upon said hoist to show the position of said skip, in the slipway, which was operated on steel rails at an incline of about 45 degrees or more, and in operating the same with a

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\*Page-number appearing at foot of page of original certified Record.

worn and defective cable, the defendant and its employees in charge of said hoist were unable to determine the location of said cable and negligently ran the same at a high rate of speed into the sheave while at the top of said skipway, catching the plaintiff's right leg between the top of said skipway and the timbers of said skip, crushing and bruising the flesh thereof and breaking the large bones of plaintiff's right leg about six inches above the ankle thereof.

#### IV.

That it became and was necessary for the defendant to maintain a proper and sufficient indicator upon the said hoist, and to have a proper cable in order to determine the location of the skip in the skipway, and to know when the same had reached the top of said skipway and to prevent running same into the sheave-wheel and timbers at the top of said skipway; that the defendant negligently and carelessly failed and neglected to provide any indicator or to keep the cable of said skipway in proper repair, or to furnish a sufficient method [2] of signalling so as to avoid accidents and injuries to the persons riding in said skipway, and because thereof the plaintiff was injured as aforesaid.

#### V.

That by reason of the negligence and carelessness of the defendant as aforesaid, and the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than a month after the said accident, and was confined to the hospital for a period of ten weeks, and is and has been since said time unable to follow his occupation as a mucker

4     *The Federal Mining and Smelting Company*

or any other occupation, and is able only with difficulty to walk upon said foot, and will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come, and plaintiff will continue to suffer on account of said fracture, and said limb is and will continue to be weakened, shortened, crooked and sore during the remainder of his life.

VI.

That at the time of the happening of the said accident, the plaintiff was of the age of 22 years, and was earning wages at the rate of \$3.00 per day, and because of said injury, and the pain and suffering he has endured, and will continue to endure, and his inability to work and earn a living, and the permanency of said injuries in the sum of (\$12,500) Twelve Thousand and Five Hundred Dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Twelve Thousand and Five Hundred Dollars, and for his costs and disbursements herein.

WALTER F. MORRISON,  
ROBERTSON & MILLER,

Attorneys for Plaintiff. [3]

United States of America,  
State of Washington,  
County of Spokane,—ss.

C. H. Hodge, being first duly sworn, upon his oath deposes and says: That he is the plaintiff named in the foregoing complaint, that he has read over the same, knows the contents thereof and that the same is true of his own knowledge, except as to the



matters therein stated to be upon information and belief, and as to them he believes it to be true.

C. H. HODGE.

Subscribed and sworn to before me on the 5th day of August, A. D. 1912.

[Seal]

FRED MILLER,

Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed Aug. 12, 1912. A. L. Richardson, Clerk. [4]

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*In the District Court of the United States, in and for the District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Demurrer [to Complaint].**

Comes now the defendant and demurs to the complaint of the plaintiff heretofore filed herein and for causes of demurrer alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

2. That said complaint is ambiguous and uncertain in this,—

(a) That said complaint fails to show in what

particular the defendant was negligent in the cable mentioned in said complaint.

- (b) In what particular the said cable was defective, or in what manner the said cable caused the alleged injury to the said plaintiff.
- (c) Said complaint fails to show in what way the said cable used on the said skip was not a proper cable for use on the said skip.
- (d) The said complaint fails to show in what way the system of signalling used by the defendant was insufficient.
- (e) Said complaint fails to show in what particular the said cable was not in proper repair, and fails to show that the alleged injury to the plaintiff was in any way caused by the condition of the cable or caused by the said cable at all.

[5]

WHEREFORE, defendant prays judgment of this its demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,

Attorneys for Defendant,

Wallace, Idaho.

State of Idaho,

County of Shoshone,—ss.

W. J. Hall, being first duly sworn, deposes and says: I am the Assistant General Manager of Federal Mining & Smelting Company, the above-named defendant, and duly authorized by said company to make this verification for and on behalf of the said Federal Mining & Smelting Company; and that the

foregoing demurrer is not interposed for delay and the same is true in point of fact.

W. J. HALL.

Subscribed and sworn to before me this 7th day of September, 1912.

[Seal]

ROY H. KINGSBURY,  
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. H. FEATHERSTONE,  
Attorney for Defendant.

[Endorsed]: Filed Sept. 9, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.  
[6]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

#554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Notice [That Demurrer to Complaint will be Called  
for Hearing].**

To the Defendant, the Federal Mining & Smelting  
Company, a Corporation, and to Featherstone &  
Fox, Defendant's Attorneys:

You, and each of you, will please take notice that

8     *The Federal Mining and Smelting Company*  
on the incoming of court, on the 18th day of November, 1912, at Coeur d'Alene, Idaho, plaintiff will call up for hearing and final determination defendant's demurrer to the plaintiff's complaint now on file in the above-entitled action.

ROBERTSON & MILLER,  
W. F. MORRISON, Jr.,  
Attorneys for Plaintiff.

Service of the above Notice, by a true and correct copy thereof, is accepted this 12th day of October, 1912, at Wallace, Idaho.

A. H. FEATHERSTONE,  
Attorney for Defendant.

[Endorsed]: Filed Nov. 14, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.  
[7]

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At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Monday, the 18th day of November, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 554.

C. H. HODGE

vs.

FEDERAL MINING & SMELTING COMPANY.

**Order Sustaining Demurrer [to Complaint, etc.]**

On this day this cause came on to be heard upon the demurrer to the complaint herein, and after argument by counsel and upon consideration the Court ordered that said demurrer be sustained, and the

plaintiff is given ten days from this date in which to file and serve an Amended Complaint. [8]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Stipulation [Extending Time to December 7, 1912,  
to File Amended Complaint].**

It is hereby stipulated and agreed by and between Featherstone and Fox, attorneys for the defendant herein, and Robertson and Miller and W. F. Morrison, Jr., attorneys for the plaintiff herein, that plaintiff shall have an extension of time in which to file his amended complaint in the above-entitled action in the above-entitled court. That said extension of time shall be to and including the 7th day of December, 1912.

Dated this 29th day of November, A. D. 1912, at Coeur d'Alene, Idaho.

FEATHERSTONE & FOX,

Attorneys for Defendant.

ROBERTSON & MILLER,

W. F. MORRISON, Jr.,

Attorneys for Plaintiff.

[Endorsed]: Filed December 7, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [9]



*In the District Court of the United States for the  
Eastern District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Amended Complaint.**

Comes now the plaintiff, and by order of Court herein filed this his amended complaint.

I.

That at all the times hereinafter mentioned the defendant was and now is a corporation, created, organized and existing under and by virtue of the laws of the State of New Jersey, and is a citizen of said State, and has complied with the laws of the State of Idaho relative to foreign corporations doing business therein, and owns and operates the Last Chance Mine, a silver and lead quartz mine at the town of Wardner, Shoshone County, Idaho, and that the plaintiff was at all of the times herein mentioned and now is a citizen and resident of the State of Idaho.

II.

That on the 17th day of May, A. D. 1912, and for more than one month prior thereto, the plaintiff was and had been in the employ of the defendant as a mucker, on the fourth level of the Last Chance Mine

about 450 feet from the "D" hoist, which is about 480 feet above the Sweeney level, and that in order to reach the workings in said mine where the defendant was engaged he was required to ride from the Sweeney level to the said point in a skip, which was operated [10] by a wire cable and hoist and upon steel rails from the Sweeney level to said place, the cable raising and lowering said skip being wound on a drum, which was a part of the equipment constituting said hoist.

### III.

That the said defendant on the date aforementioned and for some time prior thereto, had negligently and carelessly permitted its hoist and machinery used in raising and lowering the said skip to become old, worn and defective; that the said skip was required to be properly equipped with a brake so that the same could be readily and quickly stopped; that the said skipway was dark and unlighted; that the means provided for the plaintiff to go to the various workings of the mine was by the use of said skip; that the said skip as aforesaid was operated by a wire cable running from a drum; that the said cable was old, out of repair and worn; that by reason thereof, in winding and entwining the said cable and in letting the same out along said skipway sometimes the cable would entwine around the said drum evenly and sometimes unevenly, and there was no method of determining how much of the said cable was taken up in each revolution of the said drum because the said cable was old, worn, and uneven in size, and there were no means provided for said cable to en-

twine around said drum evenly.

#### IV.

That in operating the said hoist it was practically impossible to know the exact location of the said skip when being hoisted or to determine the location thereof; that it became necessary in order to determine the exact location of the said skip to have an indicator at said hoist so connected with the skip by electric current or otherwise as to fix the location of said skip, which said indicator was an ordinary precaution necessary to be taken by the said defendant, or that it was necessary to fix some appliance or indicator on the [11] sheave-wheel or drum, or hoist so as to tell the exact position of the said skip.

#### V.

That at the time of the happening of the said accident the said defendant negligently failed to maintain its said appliance in a safe and proper condition or to properly light the premises, and negligently failed to provide a brake on said hoist so that the same could operate quickly, and failed to furnish any sufficient or proper indicator, and negligently furnished the said old and defective cable so that instead of stopping, or causing to be stopped, the skip, in the skipway provided therefor at the top of said skipway, the defendant ran the said skip at a high rate of speed, and because of said condition the same could not and was not stopped at the proper place on account of the negligence of the defendant as aforesaid, but ran into the sheave-wheel at the top of the said skipway, catching the plaintiff's right

leg between the top of said skipway and the timbers of said skip, crushing and bruising the flesh thereof and breaking the large bone of plaintiff's right leg about six inches above the ankle thereof.

## VI.

That the negligence of the said defendant was because it failed to furnish proper appliances as aforesaid, or to keep the same in proper shape, and because of its negligence in failing to maintain a proper and sufficient indicator upon said hoist to locate the position of said skip, and in negligently having a cable that was entwined around the said drum unevenly as the said old and defective cable did, and further in failing to stop the said skip at the top of said skipway, and the said defendant further neglected to provide a cushion or appliance at the top of said skipway to prevent the said skip from running against the said sheave-wheel [12] and timbers at the top of said skipway, and in neglecting and failing to provide a proper top to said skip so as to render it safe under said condition, and in failing to furnish a safe place in said skip for this plaintiff to stand to avoid accidents to persons riding in said skip, and in failing to provide proper rules for operating said skip so as to notify the employees of the said defendant, the skipmen and passengers on said skip where the same would be stopped, and that because of said negligence as above set forth the said plaintiff was, while in the exercise of due care on his part, and solely because of defendant's said negligence, injured as herein set forth.



## VII.

That by reason of the negligence and carelessness of the defendant as aforesaid, and the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than a month after the said accident, and was confined to the hospital for a period of ten weeks, and is and has been since said time unable to follow his occupation as a mucker or any other occupation, and is able only with difficulty to walk upon said foot, and will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come, and plaintiff will continue to suffer on account of said fracture, and said limb is and will continue to be weakened, shortened, crooked and sore during the remainder of his life.

## VIII.

That at the time of the happening of the said accident the plaintiff was of the age of 22 years, and was earning wages at the rate of \$3.00 per day, and because of said injury, and the pain and suffering he has endured, and will continue to endure, and his inability to work and earn a living, [13] and the permanency of said injuries in the sum of Twelve Thousand and Five Hundred Dollars (\$12,500.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of TWELVE THOUSAND AND FIVE HUNDRED DOLLARS (\$12,500.00), and for his costs and disbursements herein.

ROBERTSON & MILLER,  
W. F. MORRISON, Jr.,  
E. W. ROBERTSON,

Attorneys for Plaintiff.



State of Washington,  
County of Spokane,—ss.

E. W. Robertson, being first duly sworn, on his oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause, that he has read the foregoing complaint, knows the contents thereof and that the same are true except as to the matters and facts therein stated on information and belief, and as to them he believes them to be true, and that he makes this verification for and on behalf of the plaintiff, because the plaintiff is not now within the State of Washington.

E. W. ROBERTSON.

Subscribed and sworn to before me this 3d day of December, 1912.

[Seal]

DORA BEACH,

Notary Public in and for the State of Washington,  
Residing at Spokane, Wash. [14]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff, .

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

## AFFIDAVIT OF SERVICE BY MAIL.

State of Idaho,

County of Kootenai,—ss.

W. F. Morrison, Jr., being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named plaintiff; that on the 7th day of December, 1912, affiant served upon the attorneys for the defendant, Featherstone & Fox, residents of the city of Wallace, Shoshone County, Idaho, the original amended complaint herein by enclosing a copy of the same in an envelope, sealing said envelope with a copy of said amended complaint enclosed therein, which envelope was addressed to said Featherstone & Fox, at Wallace, Idaho, and deposited said envelope containing a copy of said amended complaint in the postoffice at Coeur d'Alene, Idaho, and prepaid the postage thereon, and had said letter registered, the registry receipt for which is hereto attached, made a part hereof and marked Exhibit "A."

That the residence of the attorneys for the plaintiff, Robertson & Miller, is Spokane, Washington; that the residence of the attorney for the plaintiff, W. F. Morrison, Jr., is Coeur d'Alene, Idaho; and that there is a regular communication by mail between said City of Coeur d'Alene, Idaho, and said Wallace, Idaho; [15] and a United States post-office at both of said places.

W. F. MORRISON, Jr.

Subscribed and sworn to before me this 7th day of December, 1912.

[Seal]

W. F. McNAUGHTON,  
Notary Public.

**Exhibit "A."**

Letter No. 2641.

Received for registration, Dec. 7, 1912, from W. F. Morrison, Jr., addressed to Featherstone & Fox, Wallace, Idaho.

Postmaster,  
Per K.

[Endorsed]: Filed December 7, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [16]

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*In the District Court of the United States, in and for  
the District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a  
Corporation,

Defendant.

**Demurrer to Amended Complaint.**

Comes now the defendant, Federal Mining & Smelting Company, and demurs to the amended complaint of the plaintiff heretofore filed herein, and for cause of demurrer, alleges:

1. That said complaint does not state facts suffi-

cient to constitute a cause of action against the defendant.

2. That said complaint is ambiguous and uncertain in this:

- (a) That said complaint fails to show in what particular the defendant was negligent or careless in using its hoist and machinery mentioned in said complaint, or in what particular the same was defective.
- (b) In what particular the said cable mentioned in said complaint was defective, or in what manner the said cable caused the alleged injury to the said plaintiff.
- (c) Said complaint fails to show in what way the said cable used on said skip was not a proper cable for use on the said skip.
- (d) Said complaint fails to show in what was the system of signaling used by the said defendant was insufficient, or in what way the system of signaling, in any way, contributed to the injury alleged by the plaintiff. [17]
- (e) Said complaint fails to show that the alleged injury to the plaintiff was in any way caused by the condition of the said cable or caused by the said cable at all.

WHEREFORE defendant prays judgment of this its demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,  
Attorneys for Defendant, Wallace, Idaho.

State of Idaho,  
County of Shoshone,—ss.

W. J. Hall, being first duly sworn, deposes and says: I am the Assistant General Manager of the Federal Mining & Smelting Company, the above-named defendant, and duly authorized by said company to make this verification for and on behalf of the said Federal Mining & Smelting Company; and that the foregoing demurrer is not interposed for delay and the same is true in point of fact.

W. J. HALL.

Subscribed and sworn to before me this 16th day of December, A. D. 1912.

[Seal] ALBERT H. FEATHERSTONE,  
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. FEATHERSTONE,  
Attorney for Defendant.

[Endorsed]: Filed Dec. 19, 1912. A. L. Richardson, Clerk. [18]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.



**Order Overruling Demurrer [to Amended Complaint].**

The demurrer of the defendant to the amended complaint of the plaintiff herein having been submitted without argument, and the attorneys for plaintiff and defendant herein having orally agreed that the same shall be overruled, and the defendant given to the 1st day of May within which time to file its answer, it is hereby

ORDERED, That the defendant's demurrer to the plaintiff's complaint in the above-entitled action be and the same is hereby overruled, with leave to the defendant to serve and file its answer on or before the 1st day of May, 1913.

FRANK S. DIETRICH,  
District Judge.

Due service of the within and foregoing Order, by a true, full and correct copy thereof, is hereby accepted at Wallace, Idaho, this 12th day of April, 1913.

FEATHERSTONE & FOX,  
Attorneys for Defendant.

[Endorsed]: Filed April 17, 1913. A. L. Richardson, Clerk. [19]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Answer to Amended Complaint.**

Comes now the defendant, Federal Mining & Smelting Company, and answering the amended complaint of the plaintiff heretofore filed herein admits, denies and alleges, as follows:

I.

Admits all of the allegations contained in paragraph one, except that this defendant denies that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and allege the fact to be that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

II.

Answering paragraph two of the plaintiff's amended complaint, defendant admits that on the 17th day of May, A. D. 1912, and for more than one month prior thereto plaintiff was and had been in the employ of the defendant as a mucker on the fourth level of the Last Chance Mine about 450 feet

from the "D" hoist and about 480 feet above the Sweeney level, and defendant admits that in order to reach the workings in said mine where the plaintiff was engaged, the said plaintiff was allowed to ride from the Sweeney level to said point in the skip, which was operated by wire cable and hoist [20] upon steel rails from the Sweeney level to said place; denies that plaintiff was required to ride on said skip, and alleges the fact to be that the men were allowed to ride upon the said hoist in going to and from their work, the said hoist being for the purpose of raising timbers and steel and other supplies from the said Sweeney level to the various places where defendant was operating said mine, and if the said plaintiff rode upon said hoist, he did so for his own convenience.

### III.

Answering paragraph three of plaintiff's amended complaint, defendant denies that on the date before mentioned, to wit, the 17th of May, 1912, and for some time or any time prior thereto, defendant negligently and carelessly, or otherwise, permitted its hoist and machinery used in raising and lowering the said skip to become old, worn and defective or worn or defective; denies that the said skip was required to be equipped with a brake so that the same could be readily and quickly stopped, and denies that it was possible to equip such a skip with a brake so that it could be stopped; denies that said skipway was dark and unlighted; denied that the only means provided for the plaintiff to go to the various workings of the mine was by the use of said skip, and alleges the fact

to be that plaintiff and all other workmen were allowed to ride upon said skip in going to and from their places of work, and alleges the fact to be that ladders are and were also provided for the use of said workmen in going to and from their work at the various points in said mine; admits that the said skip was operated by a wire cable running from a drum, but denies that the said cable was old or out of repair or worn, and alleges the fact to be that said cable was a good cable and in good repair and of sufficient size and strength for the use for which it was intended to be used and for which it was used; denies that by reason of the said cable being old or worn or out of repair, or otherwise, that in winding and entwining the said cable [21] and in letting the same out along said skipway sometimes the cable would entwine around the said drum evenly and sometimes unevenly, and denies that there was no method of determining how much of said cable was taken up in each revolution of said drum because the said cable was old, worn and uneven in size, and denies that there were no means provided for said cable to entwine around said drum evenly.

#### IV.

Answering paragraph four of plaintiff's amended complaint, defendant denies that in operating the said hoist it was practically impossible to know the exact location of said skip when being hoisted or to determine the location thereof; and defendant alleges the fact to be that the said cable was marked so the location of the said skip could be determined; denies that it became necessary in order to determine the



exact location of the said skip to have an indicator at said hoist so connected with the skip by electric current or otherwise as to fix the location of said skip; denies that the said indicator was an ordinary precaution necessary to be taken by the said defendant, and denies that it was necessary to fix some appliance or indicator on the sheave-wheel or drum or hoist so as to tell the exact position of the said skip.

## V.

Answering paragraph five of plaintiff's amended complaint, defendant denies that at the time of the happening of the accident, or at any other time or at all, the said defendant negligently failed to maintain its appliance in a safe and proper condition, or to properly light the premises, and denies that the defendant negligently failed to maintain or provide a brake on said hoist so that the same could operate quickly, and denies that defendant failed to furnish any sufficient or proper indicator; denies that defendant negligently furnished an old or defective cable; denies that by reason of the cable being old, worn or defective that [22] instead of stopping, or causing to be stopped, the skip in the skipway provided therefor at the top of said skipway, the defendant ran the said skip at a high rate of speed, and denies that because of the condition of the same, the skip could not and would not stop at the proper place, and denies that it was on account of the negligence of the defendant, but alleges the fact to be that the said skip, hoist and raise were properly equipped with signals for stopping the said skip at any point desired by the persons riding upon the



said skip, and that the said plaintiff negligently and carelessly and against the positive rules of the defendant company, got upon the bail of said skip, and said plaintiff negligently and carelessly neglected to signal the hoisting engineer to stop the said skip at the point where plaintiff wished to get off said skip to get to his place of work.

## VI.

Denies that there was any negligence on the part of the defendant in failing to furnish proper appliances or to keep the same in proper shape, and denies that by reason of any negligence of the defendant in failing to maintain a proper and sufficient indicator upon said hoist to locate the position of the said skip, that the plaintiff received any of the injuries alleged in his said amended complaint, or any other injuries; denies that the defendant was negligent in having a cable that was entwined around the said drum unevenly, and denies that the cable was worn or old or defective, or that it entwined around the said drum unevenly; denies that the defendant was negligent in failing to stop said skip at the top of said skipway; denies that the defendant was negligent in failing to provide a cushion or appliance at the top of said skipway to prevent the said skip from running against the said sheave-wheel and timbers at the top of said skipway; denies that the defendant was negligent in failing to provide a proper top for the said skip so as to render it safe under said conditions; denied that the defendant was negligent in failing to furnish a safe place in said [23] skip for this plaintiff to stand, but alleges the fact to be

that said defendant did furnish a safe place on said skip where the said plaintiff could have stood and rode with perfect safety, and if the said plaintiff had been in a proper place upon said skip he would not and could not have been injured; denies that defendant was negligent in failing to furnish a proper method of signalling, but alleges the fact to be that this defendant did furnish a proper and sufficient method of signalling so as to avoid accidents to persons riding in said skip; denies that defendant was negligent in failing to provide rules for the operating of said skip so as to notify the employees of the said defendant, and alleges the fact to be that the rules of the defendant of which the plaintiff well knew provided that the plaintiff and all other workmen were forbidden to ride upon the bail of said or any skip in going to and from their work; denies that the hoistman running said hoist and that the plaintiff and other workmen riding on said skip were not notified where and how the skip could be stopped, but alleges the fact to be that the plaintiff well knew how to stop said skip, and that all of the passengers, workmen and hoistman who was running the said hoist operating said skip well knew the manner in which the skip was stopped, and how the signals were given for the stopping of the same; denies that on account of any negligence of the defendant, the plaintiff was injured, and denies that the plaintiff was injured while in the exercise of due or any care on his part, but alleges the fact to be that he was injured by reason of his own negligence and carelessness in failing to observe the rules of

the company and in attempting to rise upon the bail of the said skip in a position and place where he well knew he was in danger of being injured.

## VII.

Answering paragraph seven of plaintiff's amended complaint, defendant denies that by reason of the negligence and carelessness [24] of the defendant as set forth in said amended complaint or otherwise, or by reason of the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than one month after said accident; denies that he was confined to the hospital for a period of ten weeks, and denies that he has been since said time unable to follow his occupation as a mucker or any other occupation, and denies that he is only able with difficulty to walk upon said foot, and denies that he will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come or for any time; denies that plaintiff will continue to suffer on account of said fracture, and denies that said limb is and will continue to be weakened, shortened, crooked or sore during the remainder of the life of plaintiff or during any time at all, and alleges the fact to be that plaintiff is now and for more than ——— months last past, has been able to follow his usual occupation of mining and has been employed in and about the mines in the vicinity of Wardner, Idaho, and at the same or higher daily wages than he received prior to the said alleged injury.

## VIII.

Answering paragraph eight of plaintiff's amended

complaint, defendant has no information or belief as to the age of the plaintiff, and therefore denies that he is only of the age of twenty-two years; admits that plaintiff was earning wages at the rate of three dollars per day, but denies that because of said injury or because of the pain and suffering he has endured or will continue to endure, or of his inability to work and earn a living or the permanency of his said injuries or any of the said injuries, plaintiff has been injured in the sum of Twelve Thousand Five Hundred Dollars ((\$12,500), or in any other sum, or injured at all. [25]

For a separate and affirmative defense, the defendant alleges that if plaintiff was injured as alleged in plaintiff's amended complaint, he was injured by and through the negligence of a fellow-servant and not through the negligence and carelessness of the defendant company.

For a further, separate and affirmative defense, the defendant alleges that if the said plaintiff was injured as alleged in plaintiff's amended complaint, or injured at all, he was injured by reason of his own carelessness and negligence in riding upon the bail of said skip in disobedience of the rules, regulations or orders of the said defendant company, and by reason of his own negligence and carelessness in failing to give the signal to the hoisting engineer to stop the said skip at the proper place, or to give any signal to the hoisting engineer whatever, and the carelessness, fault and negligence of the said plaintiff brought about said injuries, and each thereof, and they were not sustained through or received by



or through any fault, negligence or carelessness of this defendant.

That when said defendant entered into said employment as a laborer in said mine as set forth in the amended complaint of the plaintiff, as a part of the consideration of his employment the said plaintiff agreed to assume, and he did assume, all risks and hazards of the character which brought about the alleged injuries, and did agree to assume all the risks and hazards brought about by reason of the acts of his fellow servants.

That if the said plaintiff was injured as in his amended complaint alleged or injured at all, said injury resulted from the risks and hazards of his employment which the plaintiff assumed when he entered the employment as a laborer in said mine, all of which were known to and assumed by him. That if plaintiff received the injuries complained of, he had at and up to the time he received the same and each thereof, full knowledge of the condition of the said skip and of the skipway and of the hoist and of the [26] signals by which the said skip was stopped, and assumed the risk thereof and therein at the time and place of receiving the said alleged injuries if he ever received the same or any thereof.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein expended.

FEATHERSTONE & FOX,  
Attorneys for Defendants.



State of Idaho,

County of Shoshone,—ss.

William J. Hall, being first duly sworn, deposes and says: That he is the Assistant General Manager of the Federal Mining & Smelting Company, a corporation, the defendant above named, and is duly authorized by said company to, and makes this verification for and on behalf of the said defendant corporation; that he has read the foregoing answer and knows the contents thereof, and believes the same to be true.

WILLIAM J. HALL.

Subscribed and sworn to before me this 29th day of April, A. D. 1913.

[Seal]

ROY H. KINGSBURY,

Notary Public.

Service of the within answer is hereby accepted and the receipt of a true and correct copy thereof acknowledged at Coeur d'Alene, Idaho, this 30th day of April, A. D. 1913.

ROBERTSON & MILLER,

W. F. MORRISON, Jr.,

Attorneys for Plaintiff.

[Endorsed]: Filed May 5, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.

[27]

*United States District Court, Northern Division,  
District of Idaho.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of One Thousand Dollars (\$1,000.00).

B. S. LAFFERTY,

Foreman.

[Endorsed]: Filed June 11, 1913. A. L. Richardson, Clerk. [28]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a  
CORPORATION,

Defendant.

**Judgment.**

Came again the said plaintiff, with his attorneys, and the said defendant, by its attorneys, and came again also the jury heretofore impaneled and sworn

### 32 *The Federal Mining and Smelting Company*

herein, when the trial of this cause was again resumed and the jury having heard the testimony, listened to the arguments of counsel and received the charge of the Court, upon their oaths do say they find the issues herein joined to be in favor of the said plaintiff and against the said defendant, and that they assess the amount of the plaintiff's damage and recovery herein against the defendant at the sum of One Thousand Dollars (\$1,000).

On motion of the plaintiff it is therefore hereby considered by the Court that said plaintiff, C. H. Hodge, do have and recover of and from said defendant, the Federal Mining and Smelting Company, a corporation, said sum of One Thousand Dollars (\$1,000.00), and the costs of this suit in the sum of One Hundred Sixty-six and 80/100 Dollars (\$166.80), for the collection of which said sum and costs, execution is hereby awarded.

Judgment rendered June 11, 1913.

[Endorsed]: Filed June 11, 1913. A. L. Richardson, Clerk. [29]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING & SMELTING COM-  
PANY,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that heretofore and on, to wit, the 11th day of June, A. D. 1913, being one of the days of the — Term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. Rosenhaupt & Miller and W. F. Morrison appearing for the plaintiff and Messrs. Featherstone and Fox appearing for the defendant, and thereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit: [30]

**[Testimony of George H. Kennett, for Plaintiff.]**

GEORGE H. KENNETT, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

**Direct Examination.**

(By Mr. MILLER.)

Q. State your name.

A. George H. Kennett.

Q. Where do you reside? A. Kellogg, Idaho.

Q. How long have you resided there?

A. About six years.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been practicing as physician and surgeon?

A. How long have I been practicing as physician and surgeon?

(Testimony of George H. Kennett.)

Q. Yes.      A. Eleven years.

Q. Of what school are you a graduate?

A. Rush Medical College of Chicago.

Q. Regularly admitted to practice in the state of Idaho?      A. I am.

Q. Do you know the plaintiff, Mr. Hodge?

A. I do.

Q. Did you at any time make any examination of his leg for an injury?      A. I did.

Q. When?

A. Well, he was in the hospital of which I have charge, Wardner hospital, at Kellogg, for about three months, I believe; I don't remember the dates exactly.

Q. What was the nature of the injury? [31]

A. He had a fracture of the large bone—I don't remember whether the right or left leg.

Q. Whereabouts in the leg was it?

A. A little bit below the middle of the leg, that is, between the knee and ankle.

Q. What was the nature of the fracture?

A. It was a simple fracture.

Q. More than one break?

A. No; there was only one bone broken; and it was what is known as an impacted fracture, that is, the ends of the bones after being fractured were driven together, so that it made it appear as though the leg wasn't fractured when you handled it.

Q. He was in your charge how long?

A. Oh, I think about three months—well, of course, he was in the hospital that long.



(Testimony of George H. Kennett.)

Q. What kind of a result did you get in the leg?

A. I considered it a perfect result.

Q. What is the effect of the fracture upon the leg as to weakening the leg in the future, making it subject to rheumatism?

A. Oh, if a person is subject to or has an attack of rheumatism, it is liable to settle in any part that is injured, your leg or back or anything else.

Mr. FOX.—I submit that is speculative.

The COURT.—Overruled.

Q. Is it more apt to do that than in any portion of the anatomy, than where there is not a fracture or injury? A. Yes, I think so.

Q. How does it affect them as age comes on?

A. I don't understand your question.

Q. I mean when a person who has a fracture in youth gets old, is the leg more apt to trouble him than if the fracture had not occurred? [32]

A. I think not, so far as the bone is concerned.

Q. Is there much pain accompanying a fracture of this character? A. Very little.

Q. Was there any laceration of the flesh around the fracture? A. None.

Q. Either externally or internally?

A. Well, yes, there was; there always is some injury to the soft parts, yes.

Q. Did you take an X-ray of it?

A. Yes; we took several X-rays, Dr. McCracken and myself in conjunction.

Q. Have you the plates which you took?

A. Have I them?

(Testimony of George H. Kennett.)

Q. Yes.      A. No.

Q. Would you be able to identify them if you saw them?      A. I think I would, yes.

Q. I hand you these dark colored square pieces of glass, and ask you if you can identify them, and what they are, four pieces of glass.

A. There are four of them. They are all X-ray pictures of Mr. Hodge's fractured leg.

Q. What are these glasses which you have been looking at? What are they?

A. These are the X-ray negatives.

Q. And they are produced how? How do you take them? That is, how do you take an X-ray picture?

A. You want me to describe the method? [33]

Q. Yes.

A. Well, you have some form of generating the current which you use—I have an induction coil—and you pass the current through what we call an X-ray tube, and place the leg between the tube and the plate, and expose them to the current for a certain length of time, and develop them.

Q. In what part of this largest glass which I show you is the bone of the leg?

A. The middle of it; the part that shows the lightest in the picture.

Q. That is, the solid substance in the object shows white on the negative?

A. Yes. That is in a cast, that one is, taken through a cast.

Q. Does that show the fracture of the leg, Doctor?

(Testimony of George H. Kennett.)

A. Yes.

Q. Where?

A. What do you mean—so far as the picture is concerned, or so far as the leg is concerned?

Q. So far as the picture is concerned.

A. Right in the center of the plate.

Mr. MILLER.—We offer this largest photograph in evidence.

Mr. FOX.—Q. Doctor, you say you haven't had these plates in your possession?

A. No.

Q. Where have they been, if you know?

A. I think Mr. Hodge has had them.

Q. How did he get hold of them?

A. I think he took them when he left the hospital.

Q. Since that time you haven't seen these plates?

[34] A. No.

Q. You are not positive that these are the plates that you took, are you Doctor?

A. Well, practically so, yes.

Q. Practically so? A. Yes, sir.

Q. And for all practical purposes you would say that these are the plates? A. Yes.

Mr. FOX.—Very well. I have no objection.

Mr. MILLER.—Q. What length of time had elapsed subsequent to the fracture when this picture was taken, Doctor?

A. Oh, I don't know; probably two weeks, something like that.

Mr. MILLER.—I will mark this with the figure "1," temporarily.

(Testimony of George H. Kennett.)

Q. I show you one, Doctor, marked with the figure "2," and ask you when that was taken.

A. I think that was taken at the same time as the—let's see—I don't recall when they were taken; they were taken some time after the accident; I don't recall just when.

Q. That is a picture of his leg anyway?

A. Yes, it is a picture of his leg.

Mr. MILLER.—We offer No. 2 in evidence.

Mr. FOX.—There will be no objection if the doctor thinks that these are the plates, if the Court please.

Q. I call your attention to one marked with the figure "3," and ask you what that is.

A. That is a picture of Mr. Hodge's leg, of the fracture, showing just at the upper corner. That was taken before the leg was put in a cast. [35]

Q. That which looks like a crack or crevice there is the fracture, is it? A. Yes.

Q. I show you the one marked with the figure "4" in lead pencil, and ask you what that is.

A. That is also a picture of Mr. Hodge's leg. It is the anterior posterior view taken before the cast was put on. The other was the lateral view.

Mr. MILLER.—We offer this one in evidence also. You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. Doctor, you say this was an impacted fracture?

A. Yes, sir.

Q. That is produced by pushing the bone together, something being on the heel or the foot and some-



(Testimony of George H. Kennett.)

thing on the knee and pushing the bone together?

A. In all probability, yes.

Q. Now, you say he was three months in the hospital? A. I think about.

Q. It was ten weeks, wasn't it?

A. I don't know about that.

Q. There was no perceptible shortening of the leg?

A. No perceptible, no, sir.

Q. No toeing in or toeing out?

A. No; I think the leg is normal.

Q. You have taken an X-ray picture recently in connection with Dr. Smith, haven't you?

A. Yes, sir.

Q. And could you identify those plates?

A. Yes. [36]

Q. Doctor, I hand you what is marked Defendant's Exhibit No. 1, for identification, and ask you to state if it isn't a fact that that is a photograph of a plate which you made, of an X-ray plate which you made of his leg recently, within the last month.

A. Yes.

Q. Showing the condition of the leg at the present time? A. Yes.

Q. Now, Doctor, I will hand you what is marked for identification Defendant's Exhibit No. 2. Defendant's Exhibit No. 1, Doctor, shows the break entirely healed, doesn't it? A. Yes.

Q. And likewise Defendant's Exhibit No. 2, for identification?

A. Yes, that is the picture of his leg.

Q. Defendant's Exhibit No. 1, for identification,



(Testimony of George H. Kennett.)

is taken looking at the leg from the front, isn't it?

A. Yes.

Q. And Defendant's Exhibit No. 2, for identification, is the interior aspect of the leg, that is, looking at the leg from the inside? A. Inside, yes.

Q. You say only the large bone was broken?

A. Yes.

Q. And the small bone was not fractured or broken? A. No.

Q. Doctor, did you ever see a better result of a fracture than this case presents?

A. I never have, no.

Mr. FOX.—That is all.

Mr. MILLER.—That is all, Doctor. You may be excused unless the other side wants you.

Mr. FOX.—I think we will not need the doctor further. [37]

**[Testimony of O. D. Chism, for Plaintiff.]**

O. D. CHISM, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name?

A. Omar Daniel Chism.

Q. Where do you reside?

A. Wardner, Idaho.

Q. What is your business?

A. Well, the last three years I have been engaged in mining, that is, working in the mines; I guess you would call it mining.

(Testimony of O. D. Chism.)

Q. Where were you working on the 17th day of May, 1912?

A. I was working in the Chance mine on four level, for Walker Johnson.

Q. What department of the mining were you engaged in?     A. Mucking, shoveling.

Q. Where is the location of the place where you were engaged from the entrance to the mine, how far from the entrance to the mine?

A. The outside entrance, you mean?

Q. Yes.

A. Oh, it is quite a ways. It must be—I don't know exactly how many feet, but something like—well, I would think almost half a mile.

Q. At what particular place were you working on this day, that is, I call your attention to the time, Mr. Hodge was hurt.

A. What particular place?

Q. Yes.

A. Well, I was working in the workings up on four, in the McIntyre stope.

Q. Were you on the skip at the time Mr. Hodge was injured? [38]     A. Yes, sir.

Q. Describe to the jury what a skip is, and what this skip was used for.

A. The location of the skip?

Q. What is a skip.

A. Well, the term "skip," I guess, what they call there, is just simply a carrier on four wheels, something like a car, has standards on it, four wheels, and two axles, and a couple of standards to hold by,

(Testimony of O. D. Chism.)

or keep the timbers on.

Q. How was this particular skip operated?

A. Why it was operated by a cable, and the power was air.

Q. How was the cable attached? A. To a drum.

Q. How to the skip?

A. Well, it was attached by a knuckle or a coupling from the rope to the bail.

Q. How was the skip operated up and down the skipway, that is, on what did it run? Were there any wheels under it, or anything? A. Yes.

Q. What did it operate on?

A. They operated on rails, "T" rails, iron rails.

Q. What was the length of the skipway in which this particular skip was operated?

A. Well, of course, I don't know. The best of my knowledge I would think the distance would be about—well, 400 feet from the Sweeney up to four, where we got off.

Q. How many stations are there between the two points?

A. Between the Sweeney level and—?

Q. Between where the skip started and where it stops.

A. There was only two—four and five levels.

Q. And the levels are how far apart? [39]

A. Well, I don't know, but I would judge that it must be 300 feet from the hoist up to the first level, number five.

Q. How is the skipway lighted?

(Testimony of O. D. Chism.)

A. Why, with incandescent lights, about a No. 16, I guess.

Q. How many of those are there?

A. One at each station.

Q. And between them are there any lights?

Mr. FOX.—If your Honor please, I submit there is no allegation here that there was insufficient light.

Mr. MILLER.—Yes, there was an allegation that it was insufficiently lighted.

The COURT.—Yes, as I remember there was some such statement.

Mr. FOX.—Well, go ahead.

A. How was that question?

Q. Any lights between the stations?      A. No, sir.

Q. What was there to hold the cable at the top of this skipway, that is, up—

A. I don't exactly catch your meaning.

Q. Well, what did the cable operate over, or to what was it attached, to hold it to the top of the skipway?

A. You mean how was the cable conveyed from the drum around back to the skipway?

Q. Yes.

A. By a sheave-wheel.

Q. Where was this sheave-wheel?

A. Well, this sheave-wheel was about, I should judge about fifteen feet from four level.

Q. That would be fifteen feet above it?

A. Yes, fifteen feet from the landing.

Q. Was there any light there? [40]

#### 44 *The Federal Mining and Smelting Company*

(Testimony of O. D. Chism.)

A. Yes, sir, there was a light at the station, at the landing.

Q. Any light up at the sheave-wheel?

A. No, sir.

Q. Just tell us about getting into this skip with Mr. Hodge, and what happened on the way up.

A. Well, we got in the skip as we do ordinarily, and had a full load, six, and we sped on up to five, and it seems we had two men on for five, and they got off at five, and I don't know just who gave them the signal—I couldn't say—but the engineer was given the signal to proceed; so we went on up to four. I was on the right-hand side of the upper deck, and after we came up—of course we can tell when we are getting up near the station, because you can see the chute and see the light, of course, so when we come up near the station I discovered that the engine was—there was no slack-up. I saw—well, I became excited a little bit. I saw we was going on up above the station, so I reached for the bell cord to signal him to stop, and at the rate we were going I had to give him a quick flash, because the string is only about four and a half feet long, and in passing this distance why I had to reach hurriedly in order to get the string.

Q. Just describe this string.

A. Well, there is a string, a small cord, that hangs across the station, that is used for signaling the engineer to lower or hoist, and we give flashes by pulling the string; one pull is to stop, and two is to go ahead, and so on. And I just caught the string in



(Testimony of O. D. Chism.)

time to flash, and I gave a very quick flash—that is, I say—I won't say—No; I will correct that. I won't say I gave a flash at all, because we pulled it so quick that I don't know whether it flashed or not.

Q. Why were you required to pull it quickly?  
[41]

A. Well, as I said, the reason I pulled it quickly was because, at the rate of speed we were going, I had no time to pull it slowly; it would have been impossible to pull it slowly, because it stands to reason that I had—that I couldn't have pulled it otherwise, because at the rate of speed we were going—

Q. What rate of speed does this skip travel up there, do you know?

A. Well, I couldn't say. I don't know just what—it is a single motion engine, I think. I don't know just what—I don't know the size of the drum, and I don't know the revolutions it makes, but I would judge something like—Oh, I would judge 250 feet a minute, something like that—200 feet a minute.

Q. Then what finally happened?

A. Well, after I gave the flash that is, after I pulled the string, of course there was no stop, we crashed into the bulkhead.

Q. What do you mean by that?

A. Well, the bulkhead is a large timber there, about—it must be 16 feet in diameter, that is, placed about three feet from the sheave-wheel, on account of protection.

Mr. FOX.—I guess the witness means sixteen inches in diameter.

(Testimony of O. D. Chism.)

A. Sixteen inches, yes, sir. It is placed about three feet from the sheave-wheel.

Q. Where was Mr. Hodge on the skip?

A. Well, Mr. Hodge was right above me. I was on the upper deck on the right-hand side going up, and Mr. Hodge was on the bail above me.

Q. How many men does that skip hold?

A. Why, six generally rides on it.

Q. How long had you been riding up and down in that skip?

A. Well, I have been riding up and down ever since it was [42] installed there.

Q. Was Mr. Hodge in a position usually occupied by some of the men in going up or down?

Mr. FOX.—I object, if the Court please. It makes absolutely no difference, if he puts himself in an unnecessarily dangerous position, whether other people did so or not. I submit that it is immaterial. It is all right for him to ask whether or not men rode up and down upon that skip, but as to whether or not other men took the chances that this man took in riding upon that bail is not material whatsoever, and I can show your Honor authorities to that effect.

Mr. MILLER.—Counsel certainly knows that there isn't anything before the Court and jury yet that he was in an unnecessarily dangerous position.

The COURT.—Objection sustained.

Q. What position did the men in going up in that skip occupy? How were they appointed around over the skip?

Mr. FOX.—It doesn't appear that anybody

(Testimony of O. D. Chism.)

pointed them around over the skip, so far as we know.

The COURT.—Read the question.

(Last question read.)

Mr. FOX.—If it is confined to this one particular case, I have no objection, but counsel is trying to get in the very thing your Honor just ruled out.

Mr. MILLER.—I don't understand that this is ruled out.

The COURT.—He may answer this question, as relates to this particular time when the accident occurred. How were the men located upon this skip?

A. There was two on the lower deck, and two on the upper deck, and one on the bail. I say the upper deck—well, there is a [43] piece of timber in the skip where we get on, that is, where we—

Q. Who was on the bail on this occasion?

A. On this occasion?

Q. Yes. A. Mr. Hodge.

Q. How was he situated, that is, how did he occupy the position? A. On the bail?

Q. Yes.

A. I couldn't say because I don't know.

Q. How fast was this skip running at the time it struck the bulkhead?

A. Well, I couldn't see that there was much change in the speed from the time we started.

Q. Did you see the position in which Mr. Hodge's leg was caught? A. No, sir, I did not.

Mr. MILLER.—You may cross-examine.

(Testimony of O. D. Chism.)

Cross-examination.

(By Mr. FOX.)

Q. Mr. Chism, you say that six men can ride upon this skip? A. Yes, sir.

Q. That is, two men would be practically sitting in the bottom? A. Yes, sir.

Q. With their feet against the dash board or the bottom board? A. Yes, sir.

Q. And two men would be sitting upon the cross-piece or bolster, as it is called, right in the center? [44] A. Yes, sir.

Q. And two men would be sitting upon the top bolster, or just below the bail?

A. No, that is wrong. There would be three men on the lower deck. There would be two men on the side and one man in the center.

Q. It isn't necessary for anybody to ride upon the bail in order for six men to be accommodated upon that skip? A. Well, yes, I would think so.

Q. It would be? A. Yes.

Q. In other words, it would only accommodate five men sitting in the skip? A. Yes.

Q. Now, Mr. Chism, that is a timber skip, isn't it, used for timber and for the hoisting up and down of tools and things of that kind, that is what it is primarily designated for, I will ask you?

Mr. MILLER.—I would like for counsel to ask a question and not make a speech to the witness every time.

Mr. FOX.—If your Honor please, I presume I have a right to ask the question in the form I see fit.



(Testimony of O. D. Chism.)

A. Of course, you said about it being a timber skip. Of course, it is used for hoisting timbers and steel and the like of that, but it is also used for hoisting men. Of course you might term it that, but there is men ride on it.

Q. But it is primarily designed for the purpose of hoisting timber, is it not?

A. Well, I couldn't say that it is specially put there for timber, no.

Q. The men rode upon that for their own convenience to get up there? There were other means by which the men could get up to [45] that work?

A. There was a skipway over "D."

Q. And there were ladders which they could climb?

A. No, I don't know of any ladders.

Q. You don't? A. No, I don't.

Q. You say the men did ride up there?

A. Yes, sir.

Q. You say you stopped upon the 500 foot level?

A. Yes, the five level.

Q. The five level? A. Yes, sir.

Q. And was it you who rang, or rather who pulled the rope which gave the signal to stop?

A. At five?

Q. Yes.

A. I couldn't say; I don't remember about that.

Q. But it was stopped in that manner, wasn't it?

A. Oh, yes.

Q. Did you come down back with the skip when they brought the plaintiff down?

A. No, sir, I did not.



(Testimony of O. D. Chism.)

Q. You stayed up there?      A. Yes, sir.

Q. Did you see the signals operated at the time when they brought the plaintiff down?

A. Oh, yes, yes, sir.

Q. The skip was moved by means of this rope?

A. By the signal.

Q. By means of giving a signal with this rope?

A. Yes, sir. [46]

Q. That is, after the accident?      A. Yes, sir.

Q. Now, you say that there were six of you riding upon that skip when you started at the—

A. From the Sweeney, yes, sir.

Q. And upon the five hundred foot level, or at the five level, whatever it is called, two men got off?

A. Yes, sir.

Q. Nothing to prevent the plaintiff, then, from getting off the bail and getting down into the skip, was there?

A. No, nothing to prevent him if he had spoken.

Q. Nobody else got hurt upon the skip except the plaintiff?      A. No, not that I know of.

Q. He wouldn't have gotten hurt if he had sat inside—

Mr. MILLER.—I object to the question as calling for the conclusion of a witness.

Mr. FOX.—I think I might be permitted to finish my question.

The COURT.—Ask your question.

Q. He would not have been injured in this accident if he had sat in the skip, would he?

Mr. MILLER.—I object to that as calling for a

(Testimony of O. D. Chism.)

conclusion of the witness.

The COURT.—Overruled.

A. I don't think he would have been injured, no, if he had been inside the skip.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How long did the skip stop there at five level?

A. Oh, just for a few minutes; maybe two minutes, just long [47] enough for a couple of men to get off.

Q. Do you know where they got out of, what part of the skip?

A. To the best of my knowledge they got out on the lower floor, on the lower deck.

Q. Then the other two fellows were on the floor right below him, below the plaintiff, on the seat below him?

A. Well, myself, I was just below him.

Q. No room for him there?

A. Not unless I would move down on the first station, that is, the first landing of the skip.

Q. How long have men been riding up and down on that skip?

A. Ever since it was installed, I think.

Q. And how many at a time?

A. Always six, I think.

Q. And is there any rule there or any regulation or custom as to how many shall ride up at a time?

Mr. FOX.—I object, if the Court please; I don't think it is material,—a rule or custom or a regula-

(Testimony of O. D. Chism.)

tion; that is very broad.

The COURT.—You had better ask one question at a time.

Q. Was there any rule there as to how many should go up?     A. Never heard of any.

Q. Any orders?

A. No, sir, never heard of any.

Q. Any custom?     A. Well, the custom was six.

Q. Always.

Mr. FOX.—I object. I submit we are not even bound by any such custom, and we are not even bound by directions in this case. [48]

The COURT.—Overruled.

Mr. FOX.—An exception.

Mr. MILLER.—That is all.

Recross-examination.

(By Mr. FOX.)

Q. Nobody was even directed to ride upon that when there were five already on that skip?

A. No, I can't say that they were.

Q. Nobody directed you gentlemen at that time to ride six upon that skip?     A. No, sir.

Mr. FOX.—That is all.

Mr. MILLER.—I don't know whether I got your Honor's ruling as to whether that other objection was sustained or whether you had asked me to suspend. I would like to be heard upon the question of what the custom was there, in order to ask this witness another question.

The COURT.—I permitted you to ask as to what the custom was, that is, as to six riding.

(Testimony of O. D. Chism.)

Mr. MILLER.—And I also wanted to ask him what the practice had been there as to riding in the position which they did upon this occasion.

(Mr. Miller read from *Knickerbocker Ice Co. vs. Finn*, U. S. Circuit Courts, first American Negligence Cases, 742.)

(Continuing.) If we can show by this witness that for a long time in this mine it was the custom, or there was no rule to the contrary, that men had habitually, and, as the witness has said, were required, when six went up, one of them to occupy this other position—of course, [49] I don't think it is going to make much difference anyway,—but if that had been the custom for a long time, the company is presumed to know what is going on in its mine, and the jury are entitled to that evidence in determining the degree of care which this defendant should or should not have exercised there.

The COURT.—Now, what point are we getting at here? How does this question relate to your case here in chief? The question may arise if it be contended that the plaintiff was guilty of contributory negligence, or that by placing himself in a certain position he assumed the risk of danger. This is an affirmative defense.

Mr. FOX.—Yes, and it may also appear, of course, upon the plaintiff's case, and be taken advantage of for the purpose of a motion.

The COURT.—Well, if it does appear, yes, but you can't properly go into that on the plaintiff's case.

Mr. FOX.—No, not to rebut it.



(Testimony of O. D. Chism.)

Mr. MILLER.—Well, your Honor, it certainly does appear in the plaintiff's case when your Honor permits him to ask him whether, if he hadn't been upon the bail, he would have been hurt. If we haven't been permitted to go into it on our case then it leaves us in an embarrassing situation.

The COURT.—It doesn't appear that the bail was an improper place on which to ride, however.

Mr. FOX.—If your Honor please, I would like to be heard upon that proposition.

The COURT.—Well, my only question is as to whether or not it is proper to anticipate it. It may become [50] wholly immaterial. If you both concede that it bears only on the question of contributory negligence, I shall not permit you to go into it at present.

Mr. MILLER.—I concede that that is the only theory upon which I can possibly conceive that it would have any bearing upon the case.

The COURT.—I think I shall sustain the objection upon that ground, without intimating any view as to the merits of the question so far as it relates to contributory negligence.

Mr. MILLER.—That is all.

Q. Now, Mr. Chism, you say you were riding on the top?     A. Yes, sir, on the left-hand side.

Q. And he was above you?     A. Yes, sir.

Q. His feet were on the top bolster or cross-piece?

A. Well, they might have been on the top, and they might have been partly down, I couldn't say; I don't know how he was riding.



(Testimony of O. D. Chism.)

Q. Somebody else was sitting beside you?

A. Yes, sir.

Q. And it would have been necessary for him to have his feet on top of the cross-piece, wouldn't it? There would have been no other place where he could put his feet?

A. He could put his feet on our shoulders; they do that sometimes.

Q. Under your shoulders,—how do you mean?

A. They just partly ride on the bail; they sit on the bail, but they put their feet in the skip.

Q. And when they sit on the bail they lean on to the cable, don't they, and that is what this plaintiff did?

A. I don't know how he was riding; I couldn't tell you. [51]

Q. All you know is that you were sitting on the top bolster, and he was above you? A. Yes, sir.

Mr. FOX.—That is all.

**[Testimony of Nick Petrinovich, for Plaintiff.]**

NICK PETRINOVICH, duly sworn as a witness on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name.

A. Nick Petrinovich.

Q. Do you remember—

Mr. MILLER.—I will make this as brief as I can, if counsel will indulge me.

Mr. FOX.—Certainly.

(Testimony of Nick Petrinovich.)

Q. What were you doing on the 17th day of May, 1912, the day that Hodge was hurt?

A. Well, the 17th day I have been mining in the place where I have been working, and the same morning we went up together on the skip.

Q. You went up on the skip with Mr. Hodge?

A. Yes.

Q. How many were there in that skip?

A. Six.

Q. And what happened at the top?

A. Well, the skip went right along past the place where we should get off, and bumped against the timber, the skip did.

Q. What happened to Mr. Hodge?

A. Well, he had pinched against the timber; I couldn't see; I was down on the bottom part of the skip.

Q. Do you know how long he was held there before they got him out? [52]

A. Oh, about eight or ten minutes before they sent him down.

Q. How long have you worked in that mine?

A. Oh, I have been working a good many years.

Q. How long have you ridden up that skip?

A. Well, ever since when they broke that raise through; I don't know how long.

Q. How many times do men go up and down that skip in a day?

A. They ride up in the morning, and evening down, at night-time.

Q. That is, every shift? A. Yes.

(Testimony of Nick Petrinovich.)

Q. Did you ever see the hoist that runs this skip?

A. Yes.

Q. Was there any indicator on it?      A. No.

Q. Any bell system for signaling?

Mr. FOX.—I object, if your Honor please. It is shown that we had a sufficient system of signaling.

Mr. MILLER.—Who has shown it?

Mr. FOX.—It was shown upon the cross-examination that the signal worked perfectly on all occasions except this one occasion. Now the sufficiency of a system of signaling is a question of fact for the Court to determine, and not a question for the jury to determine. If your Honor is in doubt upon that point I will show you. It is a question of fact for the Court to determine, whether or not the system was sufficient there.

Mr. MILLER.—There isn't any evidence for the Court to pass on yet.

The COURT.—Overruled.

Mr. FOX.—An exception.

Q. Was there any bell system there? [53]

A. 'The only way, to pull the cord down to the station to stop the skip.

Q. That was the light?

A. The light, yes, flash.

Q. Did you see anybody try to stop it?

A. No, I couldn't see because I was on the bottom of the skip. I was looking down toward the bottom of the shaft.

Q. When the skip goes by a station, is it dark or light at the station?

(Testimony of Nick Petrinovich.)

A. Well, dark above the station, and one light there on the station.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You were in the bottom? A. On the bottom.

Q. You weren't hurt? A. No.

Q. And you say that the plaintiff was riding on top of the skip, on the bail? A. Yes.

Q. Did you see him up there?

A. Well, I know when he was—before we started to go up.

Q. He climbed up on top of that, did he?

A. Well, he was sitting on the cross-piece on top, yes.

Q. He was sitting on the bail?

A. I don't know how he was sitting.

Q. He was above you?

A. Yes; a couple of men was above me; I was on the bottom.

Q. Did you see the way he was hurt? A. No.

[54]

Q. You didn't? A. No.

Q. If the plaintiff had been sitting where you were sitting, or in the skip, he wouldn't have been hurt, would he?

Mr. MILLER.—I object to it as an improper cross-examination.

A. I was first—

Mr. FOX.—Just a minute.

(Testimony of Nick Petrinovich.)

Mr. MILLER.—And it calls for a conclusion of the witness.

(Last question read.)

A. No.

The COURT.—I think I shall sustain the objection.

Mr. MILLER.—I move to strike out the answer.

The COURT.—Yes, it may be stricken out.

Mr. FOX.—I think that is all. [55]

**[Testimony of Joseph Bruder, for Plaintiff.]**

JOSEPH BRUDER, duly called and sworn as a witness on behalf of plaintiff, testified as follows, on

**Direct Examination.**

(By Mr. MILLER.)

Q. What is your name?      A. Joseph Bruder.

Q. What were you doing on the 17th day of May, 1912, the day that Mr. Hodge was injured?

A. I was in the mine.

Q. Were you in the skip with him?

A. Yes, sir.

Q. How long has that skip been used for hoisting men there and timbers?

A. I don't know how long. I was moved up from the shaft to number four level a year ago last March.

Q. How long have you been riding up in that skip?

A. Ever since a year ago last March.

Q. How many men ride in it at a time?

A. Six, generally.

Q. How do they sit in the skip, or how are they located?



(Testimony of Joseph Bruder.)

A. There is three in the bottom.

Mr. FOX.—I must object to that; it certainly is not admissible, and it is not binding upon this defendant. It is obvious, if your Honor please, that this is a dangerous place. The Courts have held (citing cases and reading therefrom, followed by some discussion). There would be absolutely no liability whatever, if your Honor please, for the simple reason that it is obvious and plain that that is a dangerous place, and there is a proper place provided.

The COURT.—I shall sustain the objection at the [56] present time because it is anticipating a defense, but without any intimation that I shall ultimately hold that it isn't material, if you seek to relieve yourself of the responsibility upon the theory of contributory negligence. I will hear you at that time.

Mr. FOX.—That will be satisfactory.

Q. What happened when the skip got to the top?

A. Went up against the timber, against the cross-piece.

Q. How far was that above the usual place of stopping? A. About between six and eight feet.

Q. What happened to Mr. Hodge there?

A. That is where he got hurt.

Q. Did you notice how his leg was caught?

A. His leg was caught between the skip and the cross-timber.

Mr. MILLER.—You may cross-examine.

(Testimony of Joseph Bruder.)

Cross-examination.

(By Mr. FOX.)

Q. His leg was caught between the top of the skip and the cross-piece, was it?     A. Yes, sir.

Q. You saw him caught there, did you?

A. Yes, sir.

Q. He had been sitting on the bail, hadn't he?

A. Yes.

Q. And if you sit and ride on the bail you have got to lean up over the cable in order to ride up, don't you?

A. You lean up against the cable, yes, sir.

Q. And that is the way he rode up there?

A. Yes, sir.

Mr. FOX.—That is all.     [57]

**[Testimony of Jack Edwards, for Plaintiff.]**

JACK EDWARDS, duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name?     A. Jack Edwards.

Q. Where do you live?

A. Live at Wardner, Idaho.

Q. What is your business?

A. My business now is working in a livery-stable.

Q. What business were you engaged in on the 17th day of May, 1912, at the time Mr. Hodge was hurt?

A. I was working in the Last Chance on hoist.

Q. What hoist were you running?

A. I was working on the "D" hoist, and the "White."

(Testimony of Jack Edwards.)

Q. Do you know what hoist it was that operated the skip upon which Mr. Hodge was riding at the time he was hurt?

A. Yes, sir; it was the "White" hoist.

Q. Did you ever operate that hoist?

A. Yes, sir.

Q. Were you acquainted with it on that day?

A. I was not; I was off duty then.

Q. I mean were you acquainted with the hoist?

A. Yes, sir; I have run it.

Q. I wish you would briefly describe to the jury how these hoists run, and how the skips are operated.

Mr. FOX.—If the Court please, how this particular skip was operated—I have no objection to that.

Mr. MILLER.—Yes, that is the one.

The COURT.—Confine your answer to this particular skip or hoist. [58]

A. Well, I don't know what the degree is of the place, how steep it was, or anything about that, but it is run up with a cable, and over a sheave-wheel, and back down, and fastened to the skip with a bail, I should judge, probably—the bail probably is about two feet long, I guess, comes up to an arch, with a hole in it for the cable to come back into. It is fastened on with coupling bolts, pulled up and down from this cable over the sheave-wheel, and back to the drum.

Q. What is the drum?

A. The drum is the part of the engine that holds the cable; the cable winds up on it on the engine.

Q. What, if anything, was there on this hoist or

(Testimony of Jack Edwards.)

in connection with it, to indicate the position of the skip in the skipway?

A. I don't understand you—to keep it on the track, or to keep it from jumping off?

Q. No. What was there on the hoist, if anything, that would show the position of the skip in the skipway?

A. There was nothing that I know of except marks you would put on the cable yourself.

Q. You don't know whether there were any of those on this or not?

A. I do not, for I wasn't on it. I generally put marks on myself when I was running it.

Q. What is an indicator?

A. An indicator is a concern with a gauge on it that sets up over the hoist. Some indicators is put on different from others; it depends on what kind of an engine it is on.

Q. What is the purpose of an indicator?

A. An indicator is to show you where the levels are. [59]

Q. What is the purpose of that?

A. Well, so as in case of no accidents.

The COURT.—So what?

A. So as in case of no accidents; so that you ain't liable to run a man into a timber or up into the sheave-wheel.

Mr. FOX.—I object to that as a conclusion of the witness, and move that it be stricken out. The object evidently is to know where the skip is.

The COURT.—It may stand as it is.



(Testimony of Jack Edwards.)

Q. What system did they have of signaling there, do you know?

A. The system there at that time was flash-lights. What they have now I don't know.

Q. What is known as the bell system of signaling?

Mr. FOX.—If your Honor please, I would like to save the record, and object to that as immaterial. We have shown that there was sufficient signal to start and stop this hoist, if properly operated, and it is improper to show what system we might have had.

The COURT.—Well, that is true.

Mr. FOX.—Otherwise in these cases—

The COURT.—Just wait a minute. Objection sustained.

Q. How long have you operated hoists in mines similar to this?

A. Well, that is the first one I ever worked on. I worked in there I expect about pretty close to a year, I guess, not over that.

Q. In a case where, Mr. Edwards, such a hoist as this is operated with only the flash system that you have heard described, as a signal, what would you consider, what would you say as to whether or not that is an ordinarily safe appliance to use in the operation of a hoist such as this, where men are frequently traveling up and down the skip. [60]

Mr. FOX.—Just a moment. I object, if your Honor please; it certainly is incompetent for this witness to testify.



(Testimony of Jack Edwards.)

The COURT.—Just make your objection, Mr. Fox.

Mr. FOX.—I object on the ground that it is incompetent, irrelevant and immaterial, and that this witness has not qualified himself to answer.

The COURT.—Read the question, Mr. Reporter.

(Last question read.)

The COURT.—I doubt whether the witness has been sufficiently qualified, Mr. Miller. I think I shall sustain the objection on the ground of incompetency.

Mr. MILLER.—He has operated there for two years.

Mr. FOX.—One year, he says.

The COURT.—I understood him one year.

Mr. MILLER.—Well, he has operated these two different hoists.

The COURT.—I think you can go into the question of the dangers or defects of this system specifically, rather than calling for an expert opinion, unless he has made some study of what systems are being used, what systems are in vogue, for the purpose of enabling him to state whether or not that is an approved system, and of course there may be a number of approved systems. One company may use one system and another company another system.

Q. How many different hoists have you worked on?

A. These two are the only ones I ever worked on.

Q. For how long?      A. For about a year.

Q. That is, you operated them continuously for a year? [61]

(Testimony of Jack Edwards.)

A. Yes, sir, only the times I would be laying off, probably a day or two at a time.

Q. Now, from your experience in operating are you able to say whether this was a reasonably safe appliance under the circumstances?

Mr. FOX.—The same objection, if the Court please.

The COURT.—Sustained.

Q. What, if any, danger is there in using the flash system of signal? A. I don't understand you.

The COURT.—You mean the flash system such as was used here?

Mr. MILLER.—Yes.

A. You mean?

Q. The kind they had there.

A. That was pulled by a cord?

Q. Yes.

A. Run by a little battery inside?

Q. What is the danger, if any, in using that system?

A. Well, there is sometimes that inside these batteries some of them will pull harder than others, and she will catch inside and won't flash no more; she will just stay there; but at that time it will put the lights out and hold them there until she sits down, until they are fixed.

Q. Is there any way, by that system, for the hoist man to know where the skip is in the skipway?

A. Well, you can't very well know unless he does get a flash where he is there, when he has got no marks to show.

(Testimony of Jack Edwards.)

Q. At what rate of speed do these skips pass these stations?

A. Well, I couldn't hardly say, with this one. There is a difference in hoists. Some of them runs faster than others. This [62] one was a small timber hoist; it would go a little bit faster than about as fast as you could run, I guess.

Q. Was there any bell signal on this hoist?

Mr. FOX.—We object as incompetent, irrelevant and immaterial.

Mr. MILLER.—I will withdraw the question.

Q. Was there any other signal or indicator other than the flash?      A. No, sir.

Q. What is the advantage of having an indicator on the hoist?

A. Well, the advantage is—it is to tell you where you are at. This indicator travels with the drum, and tells you just exactly where you are at all the way up, till you get to the end of it.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You say, Mr. Edwards, that if this system of signaling gets out of order the lights go out?

A. Yes, sir.

Q. And in that way you know if the lights are out for any length of time that it is out of order, and somebody is called to repair it?      A. Yes, sir.

Q. Now, it is a fact that there was no regular hoistman upon this particular hoist and constantly present there all the time?

(Testimony of Jack Edwards.)

A. Only at the time when the shift was going up and down.

Q. And whenever they wanted to haul timber up and down, or *stell* up and down?

A. Well, sometimes we would and sometimes we wouldn't. [63]

Q. Then they would call a hoistman off the regular hoist and tell him to go over and hoist whatever was necessary? A. Yes, sir.

Q. It was a little emergency hoist they had there, wasn't it? A. Yes, sir.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How many men were elevated up and down this skipway a day?

A. Well, sir, I couldn't hardly say.

Q. How many shifts were working?

A. There was two shifts; there was a night shift and a day shift.

Q. Do you know about how many men on a shift?

A. I should judge there would have been pretty close to a hundred, probably about forty-five; that is about it.

The COURT.—Forty-five to a shift?

A. Yes, sir.

Q. They all were taken up and down in this skipway? A. Yes, sir.

Mr. MILLER.—That is all.

(Testimony of Jack Edwards.)

Recross-examination.

(By Mr. FOX.)

Q. You don't know whether there were 45 men taken up and down every day in that skip, do you?

A. Well, sir, I couldn't say there was every day; there might have been some days there might have been more, and other days there might have been less.

Mr. FOX.—That is all.

Mr. MILLER.—That is all. [64]

**[Testimony of Luster Urad Ashby, for Plaintiff.]**

LUSTER URAD ASHBY, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name in full.

A. Luster Urad Ashby.

Q. Where do you live, Mr. Ashby?

A. Wardner, Idaho.

Q. What is your business?

A. My business now is a cager.

Q. Where were you,—what were you doing on the 17th of May, 1912?      A. On the 17th of May?

Q. The day Mr. Hodge was hurt?

A. On the 17th of May—it was my usual custom the first thing in the morning—I hoisted the day shift in the “D” raise, and after I got the day shift up I tended skip and run the hoist alternately all the rest of the day.

Q. This particular skip?      A. “D.”



(Testimony of Luster Urad Ashby.)

Q. How many men, if you know, were hoisted a day in this skipway where Mr. Hodge was injured?

A. Well, it varied. I think the highest I remember of there being in one single shift was about 35, all the way from 20 to 35; it varied at different times.

Q. How many times had they to be taken up and down a day?

A. Just once each way, that is, once each shift each way.

Q. Two shifts?

A. Yes, sir, two shifts working underground, and three on the hoist. [65]

Q. How long have you been operating hoists?

A. I have worked on that hoist there about a month or two less than two years, and since then only a short time running another hoist in a different place.

Q. Have you worked in other mines in the Coeur d'Alenes? A. Yes, sir.

Q. And observed the hoists there? A. Yes, sir.

Q. What, if anything, was there upon this hoist to indicate to the hoistman or engineer the position of the hoist in the skipway? A. On the hoist?

Q. Yes. A. There was nothing.

Q. What system of signaling did they have?

A. They had two flash-lights, one at each station,—well, three, and one down at the bottom, on the bottom level.

Q. What danger or inconvenience is there in using a flash-light signal?

A. Well, to my mind there is considerable danger; in the first place, those flash-lights wouldn't work all

(Testimony of Luster Urad Ashby.)

the time, and that is—

Q. If they didn't work what would be the result?

A. You wouldn't know where the skip was and where they wanted the skip moved to, whether they wanted to come up or down.

Q. Would the hoistman, if it didn't work, have any means of knowing they were trying to signal him?

A. I have hoisted men there without any signals at all, without the flash-lights working.

The COURT.—That isn't the question.

Mr. FOX.—I move that the answer be stricken.  
[66]

The COURT.—Yes, it may be stricken out.

Q. If the flash-light wouldn't work would the hoistman know whether the men in the skip were wanting to stop or not?

A. If the flash didn't work?

Q. Yes, would he know whether they wanted him to stop or go on, or what?

A. I don't hardly understand what you mean.

Q. I mean, if the men in the skip attempted to signal by this flash-light and it didn't work, would there be any way then that the hoistman would know where the skip was, or whether he was going by a station or not, or could tell where the stations were?

A. Well, he could look at the cable and tell almost where they were, tell almost near the station, just by the number of turns around the drum of the cable.

Q. What if the rope was not wrapped evenly?

A. Well, we couldn't tell where we were.

(Testimony of Luster Urad Ashby.)

Q. Then there was no way there that the hoistman could tell when they had reached or were passing a station except by this flash-light?

A. That is, if the cable didn't wrap evenly; that was the only way they had of knowing where the station was.

Q. And if the flash-light wouldn't work, he wouldn't know where he was?

A. Wouldn't know where he was.

Q. What is this indicator which they have?

A. It is a device composed of a chain that is wrapped around the shafting of the drum, and this chain is wrapped around another wheel, called the spricket wheel, set up on top of the hoist on a little frame, and this spricket wheel winds around a sort of a setscrew. Around this setscrew is a little indicator shaped almost like a finger, like that, [67] coming to a point, and as the drum revolves up or down this indicator goes along in front of the hoist, and at different intervals where the levels are, they are marked there, the number of the level, and you can tell just by that indicator where you are.

Q. Do you know what the usual appliances are in the mines of the Coeur d'Alenes for indicating to the hoistman the position of the hoist in the skip?

A. As far as I know, this indicator is the only one used.

Q. Is that generally used?

A. Yes, sir, so far as I know.

Q. What would you say as to whether or not a hoist such as this, with no system of signaling ex-

(Testimony of Luster Urad Ashby.)

cept the flash that you have described, would be reasonably safe to operate under the conditions under which this hoist was operated?

Mr. FOX.—The witness is not qualified. He has run these two little hoists in this particular mine, and he has caged in other mines; recently he has been a cager in a hoist, not a hoister.

Mr. MILLER.—He said he was acquainted with hoists in other mines.

The COURT.—He has stated what the systems are. The jury, I think, can draw a conclusion about as well as he can. He may describe the systems in vogue, how they operate, and how this one operates.

Q. What are the different systems?

A. Of operating hoists?

Q. Yes,—that is, for indicating.

A. Well, I have seen only two kinds of indicators out there; one is the kind I have just been telling you about, where the indicator moves on a straight line like that, in front of the hoist. [68] Then I have seen the other system, where it has a hand that goes around just like the hands of a clock, or a dial, and at different points on this dial levels are marked. Those two, and the one flash-light, those are the only three systems I have seen used.

Q. What?

A. The flash-light and that one by the dial and the indicator that runs along in a straight line, like that, these three are the only indicators I have seen used. I have seen them run just by marks on the cable.

Q. Where they have the indicator is it also neces-



(Testimony of Luster Urad Ashby.)

sary to have the signal? A. Yes, sir.

Q. That is, the hoist, in order to be properly equipped, must have also an indicator and a signal?

A. Yes, sir.

Q. What would you say as to whether a hoist was or was not properly equipped if it had a signal and no indicator?

Mr. FOX.—If the Court please, I think it depends entirely upon the character of the hoist. There are various characters of hoists, if the Court please, generally speaking.

The COURT.—Well, I think I shall let him answer this question.

Mr. FOX.—An exception.

The COURT.—Answer the question.

A. I beg your pardon; I didn't get the question.

Q. (Last question read.)

A. It was not properly equipped unless it had both signal and indicator on.

Mr. MILLER.—You may cross-examine. [69]

Cross-examination.

(By Mr. FOX.)

Q. You say you were there two years prior to this accident, is that it?

A. No, sir, not prior; I was there two years on that job altogether.

Q. Altogether? A. Yes, sir.

Q. This was a little bit of a skip and hoist, wasn't it?

A. Well, it was not a very large hoist or a very large skip.



(Testimony of Luster Urad Ashby.)

Q. Well, it was primarily intended, wasn't it, Mr. Ashby, for timber and steel and material; that is what that kind of a skip is intended for?

A. That is what it was built for, but that is not what it was used for.

Q. I am asking you what it was built for.

Mr. MILLER.—We don't care what it was intended for.

Mr. FOX.—We do care what it was intended for.

Q. That is what it was put in there for, isn't it?

Mr. MILLER.—I object as irrelevant, incompetent, and immaterial, if the Court please.

The COURT.—He may answer.

A. I don't think it was put there for that, because I never have hoisted timber there; I have hoisted very little timber there, and no steel.

Q. You say you have or you haven't.

A. I haven't.

Q. What else is it used for besides hauling the men up and down?

A. Practically nothing, unless when they are repairing the chute, they hoist the timber for the chute, and work off the [70] skip, take their timber from the skip, and that and hoisting the men is the only things I have known it to be used for.

Q. You say it was intended though, primarily, that character of hoist and skip is intended to haul material, and not men?

Mr. MILLER.—I object to that as calling for the witness' conclusion, who didn't have anything to do with the building of the hoist.

(Testimony of Luster Urad Ashby.)

Mr. FOX.—I think it is very material to show that it was originally intended for that, and these men got to using it.

The COURT.—I don't think the witness can answer what the company's intention was. I shall sustain the objection upon the ground, if you are asking what it was intended for by the company. If you ask what such a pattern or form of skip is designed for, what it is fitted for, you may ask him.

Q. What was such a character of skip designed or fitted for? A. For hoisting timber or men.

Q. Where are you working now?

A. Up in the Tyler Lease.

Q. You are caging up there, are you?

A. Yes, sir.

Q. That is the only place you have worked upon a skip or hoist except down in the Chance?

A. Yes, sir.

Q. What other mines have you worked in?

A. I have worked in the Bunker Hill; that is all, besides in the Last Chance and the Tyler Lease; those three.

Mr. FOX.—That is all.

Mr. MILLER.—That is all. [71]

**[Testimony of Harry Martin, for Plaintiff.]**

HARRY MARTIN, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name? A. Harry Martin.

(Testimony of Harry Martin.)

Q. Where do you live?     A. Wardner, Idaho.

Q. What is your business?     A. Mining.

Q. What were you doing on the 17th day of May, 1912.     A. Running hoist in the Last Chance.

Q. What hoist?     A. The "White."

Q. Do you remember the occasion of Mr. Hodge's injury?     A. I do.

Q. What were you doing at that time?

A. I was running the hoist.

Q. What time of day was he injured?

A. Just about half-past seven in the morning.

Q. Did you get any signal to stop the hoist just before his injury?     A. I did not.

Q. Was there any indicator on your hoist?

A. There was not.

Q. What was the condition of the cable on this hoist?     A. In very bad condition.

Q. What do you mean by that?

Mr. FOX.—I object, if your Honor please. It couldn't possibly be the cause of this injury.

The COURT.—Well, I can't tell whether it was or [72] not. They have alleged that it was the cause of the injury. Of course if they don't show that it was we will take it away from the jury.

Q. What did you mean by the cable being in bad condition? Just describe it.

A. Well, one way we had of telling, sometimes we put white spots on the cable with white lead.

Q. I didn't ask you about that.

The COURT.—That may be stricken out then.

Q. In what way was the cable in bad condition as

(Testimony of Harry Martin.)

to wear or tear?

A. Well, it was an old cable, had been on there for some time, and also it was all over mud, from the bottom of the skip.

Q. Did it wrap evenly on the drum?

A. It did not, not all the time.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. The cable held the skip, didn't it?

A. It sure did.

Q. And you ran the skip up into this sheave timber?     A. I did.

Q. And it didn't break, did it?     A. It did not.

Q. What do you know about cables anyhow, Mr. Martin?

Mr. MILLER.—I don't think that is proper. I object to it as not being proper cross-examination. If he wants to ask any particular question—

The COURT.—It is not quite a fair question to the witness. [73]

Mr. FOX.—All right, if your Honor please; I will withdraw it. I think that is all.

Mr. MILLER.—That's all.

**[Testimony of C. H. Hodge on His Own Behalf.]**

C. H. HODGE, duly called and sworn in his own behalf, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name.     A. C. H. Hodge.

Q. You are the plaintiff in this case?

(Testimony of C. H. Hodge.)

A. I am.

Q. How old are you, Mr. Hodge?

A. Twenty-four last February.

Q. What has been your business or occupation in life?

A. Mining. Well, prior to that I was a soldier four years, four months and nine days. I was signal maintainer on the C. & O. & T. P. Railroad July 15, 1910, to January 28, 1912; then I came to Wardner.

Q. When did you begin work for the Federal Mining Company? A. On the 1st day of April, 1912.

Q. What were you doing? A. Mucking.

Q. How long had you been working at that place in the vicinity of where this accident occurred, that is, where you had to go up this skipway?

A. From the 1st day of April to the 17th of May.

Q. What skipway did you use in going up?

A. The "White." [74]

Q. What shift were you working on?

A. I was working for Walker Johnson on day shift at the time the accident occurred.

Q. Who was Walker Johnson?

A. He was my shifter at the time.

Q. And was your shifter located there?

A. Yes, sir; he would come around about twice a day, around through the stope, morning and afternoon.

Q. Who was the foreman of the mine?

A. E. W. Peeples.

Q. Was he frequently around there?



(Testimony of C. H. Hodge.)

A. Well, we would see Mr. Peeples about once a week.

Q. What time did you go to work on this day you were injured?      A. What time did I go to work?

Q. Yes.

A. About 7:30, I was supposed to go to work.

Q. How did you go to your place of work?

A. We went up on the skip from the White level, a distance of about 450 or 80 feet, more or less.

Q. How many of you were there in the skip?

A. Six.

Q. What, if anything, happened on the way up?

A. Sir?

Q. What, if anything, happened on the way up? What occurred? Did you get hurt, or anything?

A. They failed to get the flash, it seems, at the bottom.

Q. Well, just state what happened.

A. I got my leg broke.

Q. How? Just go ahead and tell about your getting into the skip, and where you were. [75]

A. I got in the skip at the White hoist, and hoist on up to number five, six of us on the skip. I was riding on the bail, two more men below me, and three below them; we stopped at the five hundred foot level and two men got off there, and then started up to number four, got there, and didn't slow down, and Mr. Chism flashed them, and we went into the sheave-wheel. They had a timber crossed right in front of the sheave-wheel, and I was lying in this position (indicating) on the skip,—had to, to hold

(Testimony of C. H. Hodge.)

on there. One man always rode on top. This is the shape I got in, something like this, on the skip, with my feet down this way so I could get a good brace. And the skip hit there and caught me on the back and shoulders. I turned myself to relieve myself, and this leg dropped down, and the skip just jammed right into it, just the same as it would jam into here.

Q. What was the usual place for the skip to stop there? A. Stop at the level.

Q. Always stopped there before?

A. Yes; sometimes got a little above or below it; it never went that far before.

Q. What happened to your leg?

A. The big bone in my leg was broke about here, starts here and runs around.

Q. How long were you laid up on account of it?

A. I was off five months before I done any work at all. I was in the hospital from the 17th day of May till the 24th day of July, and I went out of the hospital walking on crutches. Then I used a stick up till about the 10th day of October. Then I got *shut* of the stick and went to work the afternoon of the 16th of October. Then I worked from fifteen to twenty days a month. It was with difficulty that I done so. [76]

Q. When did you begin work regularly again?

A. I didn't work regularly until in February, the 3d day of February, 1913.

Q. Did you suffer any pain on account of the injury? A. Yes, I did.

Q. For how long?

(Testimony of C. H. Hodge.)

A. I suffer some yet, and sometimes my leg swells up now and pains. And sometimes I come home from work—it would swell up, and I could put on my dress-shoes, and I couldn't button it, and would have to leave it unbuttoned. I have had my digging-shoes when I come home swelled up till I couldn't pull it off; I would have to have a boy get hold of it and pull it off.

Q. How frequently did it pain you?

A. Right along while I was working.

Q. And it does yet?     A. Yes, sir.

Q. How frequently does it swell?

A. Well, it generally swells around in rainy weather, and of course, working, you get wet more or less, and it swells on you.

Q. What wages are you getting to-day?

A. Three dollars.

Q. You are mucking?     A. Yes, sir.

Q. Did you know that there wasn't any indicator on this hoist?     A. I did not.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You went to work, you say, on the 16th of October, did you? [77]

A. The afternoon of the 16th of October, yes, sir.

Q. Well, that was the Tyler Lease, wasn't it?

A. Worked for Jaggo there in town, of the Tyler Lease, yes, sir.

Q. And you earned \$3.50 a day from that time?

A. No, sir; \$3.00 a day.

(Testimony of C. H. Hodge.)

Q. The same you had been earning at the time you were injured?     A. Yes, sir.

Q. And you worked at the Tyler Lease there until practically the end of last year, didn't you?

A. Yes, I worked fifteen or twenty days a month, never got in over that.

Q. Fifteen or twenty days a month?

A. Yes, sir.

Q. And you don't mean to tell this jury that you were laid off on account of your leg, do you?

A. I do.

Q. Isn't it a fact that you claimed to have been laid up on account of having piles for a few days while working on the Tyler Lease?

A. I laid off for two days, yes, sir, sick.

Q. That is the only time you laid off to tell anybody about it?     A. No, sir.

Q. Where have you been working just prior to coming here?     A. For the Caledonia Company.

Q. When did you start to work for the Caledonia?

A. Started there on the morning of the 4th day of February, 1913.

Q. Just a few days after you quit the Tyler Lease last?     [78]

A. I didn't quit the Tyler Lease last; I got fired.

Q. Just a few days after you quit or got fired?

A. Yes, sir; I got fired.

Q. I don't care whether you were fired or quit. And you have been working there practically ever since, up to the 10th of May?     A. Yes, sir.

Q. And drawing \$3.00 a day?     A. Yes, sir.



(Testimony of C. H. Hodge.)

Q. And that mine just closed down and everybody quit? The work they were doing was shut down?

A. We was doing some of that lawsuit work. They had a lawsuit with the Bunker Hill, and we was doing the work there.

Q. But since that time you haven't been working?

A. No, sir.

Q. You were riding on top of this skip, were you?

A. I was.

Q. You sat right on the top cross-piece.

A. Yes, sir.

Q. Or bolster?

A. No bolster—cross-piece. The bolster is what goes inside. Some of them call it standards, and my feet was against the cross-piece.

Q. Now, take, for instance, this book as the skip. You were right on top there with your feet on top of it? A. Yes, I was.

Q. On top of the skip? A. Yes, sir.

Q. And you were lying on the bail of the cable?

A. I was.

Q. Holding on to the cable? [79]

A. Didn't hold on at all. The bail runs up about three feet, and it is a very good place to ride. If they had an indicator on it I would consider it as safe to ride there as any place else.

Mr. FOX.—I move that that be stricken out.

The COURT.—Yes, it may be stricken.

Q. How long did you say this bail was?

A. About three feet. It comes down something like this, to a kind of a peak.



(Testimony of C. H. Hodge.)

Q. The bail consists simply of an iron rod that is bent, doesn't it?

A. No, sir; it is a bent piece of iron about that weight, and that thick, five or six inches wide, about two inches thick.

Q. Five or six inches wide?      A. Yes, sir.

Q. You say it is three feet long?

A. Yes, sir, comes kind of around in a circle.

Q. On this particular skip?

A. On the rest of them too, yes, sir.

Q. And that is where you were riding?

A. That is where I was riding.

Mr. FOX.—I think that is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How many men went up and down this skip a day, do you know?

A. Well, sir, I should judge there was about 25 on number five level went up, and 20 or 25 on number four level, on each shift.

Q. They all had to be handled twice a day? [80]

A. Yes, sir; that is the only way I know of getting up there.

Q. Did you all go up that skip?

A. Four and five; we had orders to go that way, yes, sir.

Mr. MILLER.—That is all.

Recross-examination.

(By Mr. FOX.)

Q. Would you recognize a picture of this skip?

(Testimony of C. H. Hodge.)

A. Yes, sir, I would.

Q. If you should see one? A. Yes, sir.

Mr. FOX.—Mark this, please.

(Photograph marked Defendant's Exhibit No. 3.)

Q. I hand you now what is marked Defendant's Exhibit No. 3, for identification, and to be fair to you I will explain that I have marked the bottom—this is taken from the 400 level, you see, and looks right into the opening of the skip, you see?

A. Yes, sir.

Q. The skip is not entirely drawn up, because we couldn't get an entire picture of it, and that is the skip, is it?

A. I couldn't tell whether that is the skip or not. It has been fixed up. The skip we was riding on didn't have but one standard there; this one has four here. One or two is the most I ever saw on that skip.

Q. Well, they are just iron rods stuck in holes, aren't they? A. Yes, sir.

Q. Otherwise it is the same skip?

A. Yes, sir; only they have fixed it up.

Q. The only difference is that they have put these standards in, these rods? A. Yes, sir. [81]

Q. Otherwise the skip is the same?

A. Yes, sir.

Q. That is correct, is it? A. Yes.

Mr. FOX.—That is all.

Mr. MILLER.—That is all.

There is one discrepancy in the complaint. It alleges that the defendant is a corporation organized under the laws of the state of New Jersey. The an-

(Testimony of C. H. Hodge.)

swer says under the laws of Delaware.

Mr. FOX.—Well, we have alleged that it is Delaware, and we are bound by our answer in that respect.

Mr. MILLER.—With that understanding, we rest.

The COURT.—Gentlemen of the jury, you may be at ease for ten minutes.

(Jury retired from the courtroom.)

Mr. FOX.—If your Honor please, I would like to make a motion.

The COURT.—Very well.

Mr. FOX.—I would like to make a motion for nonsuit, if the Court please, upon the ground that there is no negligence shown which is the proximate cause of this injury or accident, upon the ground that if the accident occurred by reason of anyone's negligence it was by reason of the negligence of a fellow-servant, namely, the hoist man, and the other men in the skip who failed to give the signal, the negligence of either or both of them; and for the third reason that the plaintiff in this case was guilty of contributory negligence and assumed the risk, by placing himself in an obviously dangerous position, where a safe position had been open to him. [82]

(Authorities cited and read in support of motion.)

The proximate cause, if your Honor please, of this accident, was, first his own negligence, his own contributory negligence, and, second, the failure of this man down below here, Martin, to stop. He wasn't looking. The bell was pulled, even if it was only a short pull, and he was running the thing at exces-

(Testimony of C. H. Hodge.)

sive speed, for which we are not responsible. It was plainly the negligence of a fellow-servant, co-operating with the negligence of the plaintiff himself, and remotely, in the most remote degree, if your Honor please, our failure to have an indicator upon the skip. The direct and proximate cause of that injury was the fact that this man ran it at an excessive speed apparently, and failed to notice the signal which was given.

The COURT.—I think, gentlemen, as stated by Judge Shiras, each one of these cases must rest upon its own facts. In the view I take of this, I could not properly withdraw it from the jury. The motion is denied.

Mr. FOX.—May we have an exception, if your Honor please?

The COURT.—Yes.

(The jury thereupon returned into court.)

Whereupon,— [83]

**[Testimony of M. T. Smith, for Defendant.]**

M. T. SMITH, duly called and sworn on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. Doctor, will you please state your full name.

A. M. T. Smith.

Q. Where do you reside? A. Wallace, Idaho.

Q. You are a physician and surgeon, are you not?

A. I am.

Q. And duly licensed to practice that profession



(Testimony of M. T. Smith.)

in the State of Idaho?     A. I am.

Q. How long have you been in Wallace?

A. A little over three years.

Q. And are there conducting a hospital, are you not?     A. I am.

Q. You are a graduate of a medical school, are you not, Doctor?     A. Yes, sir.

Q. You know Dr. Kennett, don't you, who testified here this morning?     A. Yes, sir.

Q. Please tell the jury what the fact is as to whether or not you took a number of X-ray photographs of the leg which was injured of the plaintiff.

A. I was present when these were taken; they were taken at my request by Dr. Kennett.

Q. You made an examination of the plaintiff's leg, did you?     A. I did.     [84]

Q. And you were present when those pictures were taken and developed?     A. I was present, yes.

Q. I show you Defendant's Exhibit No. 1, for identification, and ask you to state if you recognize that as one of those pictures.

A. This is a print of one of the negatives which was taken at that time.

Mr. MILLER.—I understand the Courts have held that the negative—I will not make any objection.

Mr. FOX.—I prefer to introduce the photographs; they are so much more readily seen and understood.

Q. That is another of the pictures, is it?

A. Yes, sir.

Q. From what position was that taken?



(Testimony of M. T. Smith.)

A. Directly from the front, backwards.

Q. Does it show the position where the injury occurred, or the break occurred? A. Yes, it does.

Q. I show you Defendant's Exhibit No. 2, for identification, and ask you to state if that is one of the pictures which you took at that time of the plaintiff's leg.

A. This is a second view which was taken from the side.

Q. From the interior portion of the leg, was it?

A. Yes, sir.

Q. Where, if at all, was there a fracture in that leg?

A. There was a fracture about, I should say, four to six inches above the ankle joint.

Q. I will ask you, Doctor, from your examination of the plaintiff, whether you are able to state as to whether or not that fracture is thoroughly healed?

A. The fracture was what we call an oblique fracture, that is, [85] it was not straight through, but was on the bias, across the bone. The fracture is perfectly healed and the leg is solid.

Q. Doctor, I will ask you to state whether you have ever seen a better setting of a leg or a better result.

Mr. MILLER.—I object to it as immaterial.

The COURT.—Overruled.

A. No, I can't say that I have. The setting was as nearly perfect as could be.

Q. What was your opinion, Doctor, as to whether the plaintiff in this case should have perfect use of

(Testimony of M. T. Smith.)

his leg the same as before?

A. I can see no reason why he shouldn't have as perfect use as prior to the accident.

Mr. FOX.—That is all.

Cross-examination.

(By Mr. MILLER.)

Q. Doctor, supposing that at this time the leg frequently swells and pains him, especially after he has been working in the mine during the day and being on his feet, to what would you attribute that?

A. A swelling of the leg following a fracture is usual for some months following.

Q. And you would attribute that to this fracture?

A. Yes, in all probability.

Q. Are you able or not to say how long it will probably continue?

A. I would say, with a fracture which has as perfect an outcome as this, it would not continue very long, and it would not be usual for it to continue to the present.

Q. If it does continue to the present time what would you [86] say, whether you would attribute it to the fracture or not?

A. If it has swelled, from the time the cast was taken off, I should think it was.

Q. If it has continued to the present, what would you be able to say as to the future?

A. Only from the probabilities of the case, judging from the amount of injury which is apparent.

Q. You can't say whether it would be six months or two years longer?

(Testimony of M. T. Smith.)

A. I could not say any time.

Q. And it is a fact, isn't it, that a person becomes subject to rheumatism or something like that, or becomes slightly subject to it, it will attack him first in a fracture?

A. If this occurs within a short time after the accident, yes.

Mr. MILLER.—That is all.

Redirect Examination.

(By Mr. FOX.)

Q. Doctor, in your opinion then there would be no reason for there being swelling there at the present time?

A. There was no swelling at the time I made the examination, which was along in the afternoon; I can see no reason why there should be swelling.

Q. And can see no reason why there should be pain? A. I can see none.

Mr. FOX.—That is all.

Recross-examination.

(By Mr. MILLER.)

Q. But if there was, you would attribute it to the injury?

A. Pain is a subjective symptom that cannot be—  
[87]

Q. It is subjective?

A. If that has been continuous from the time of the injury, I should say it probably was.

Mr. MILLER.—That is all.

(Testimony of M. T. Smith.)

Redirect Examination.

(By Mr. FOX.)

Q. There was no swelling at the time you examined the leg?     A. No, sir.

Mr. FOX.—That is all.

Recross-examination.

(By Mr. MILLER.)

Q. We are speaking of when he was on his feet, Doctor, using it in the mine.

A. I couldn't say from my own knowledge. I haven't seen him following that.

Q. I say, admitting that it occurred when he was on his feet at the close of the day's work, would you attribute that to the injury?

A. There are numerous reasons why a leg should swell.

Q. I say, if at this late date it was swollen of an evening, after a day's work mucking, you would attribute that to the injury?

A. Yes, it probably would be.

Mr. MILLER.—That is all.

Mr. FOX.—That is all. [88]

**[Testimony of Rush J. White, for Defendant.]**

RUSH J. WHITE, a witness duly called and sworn on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. Please state your full name.

A. Rush J. White.

Q. You are connected with the Federal Mining &

94 *The Federal Mining and Smelting Company*

(Testimony of Rush J. White.)

Smelting Company, are you not? A. Yes, sir.

Q. Chief engineer for the company?

A. For one thing.

Q. And as such, in charge of all the engineering work for the Federal Mining & Smelting Company throughout this mine, are you not? A. Yes, sir.

Q. Are you familiar with what is known as the "White" hoist in the Last Chance mine at Wardner?

A. Yes.

Q. And have been familiar with it for how long?

A. Ever since it was projected.

Q. And it was put in under your supervision, was it? A. Yes, sir.

Q. Originally what was that hoist intended for?

Mr. MILLER.—I object to that as immaterial.

The COURT.—Overruled.

Mr. MILLER.—An exception.

A. The primary reason for driving the White raise was to transport ore from the upper levels.

Mr. MILLER.—I object to that as being immaterial.

The COURT.—The question is, what was this skip for? [89]

A. The skip and skipway were put in as incidental to the main use of the raise, and for convenience in the repair and construction of the raise.

Q. There is an old raise right alongside of it, and this skip and skipway was used incidental to that?

A. Yes, sir.

Q. You may explain to the jury what the fact was as to whether or not the men got to using that for



(Testimony of Rush J. White.)

their convenience:

A. Yes, the men used the skipway for going back and forth to their work, to and from their work.

Q. Now, I will show you what is marked Defendant's Exhibit No. 3, for identification, and ask you to state what that is.

A. It is a photographic print looking into the White raise from four level, and showing the upper portion of the skip, and the bail of the skip and the thimble and lower part of the cable where it fastened on to the skip.

Mr. MILLER.—I think I shall object to this unless this was a photograph of this particular skip.

Mr. FOX.—Well, I will prove that. You might presume that much.

Mr. MILLER.—Your Honor will remember that when it was presented to Mr. Hodge he said it was not the character of bail that was used when he was there.

Mr. FOX.—He did not say so, if the Court please.

Mr. MILLER.—He said this had two something on, while the other didn't.

Mr. FOX.—He said this had two standards on it.

The COURT.—There is a little too much discussion, gentlemen. I will rule on these objections. The objection is overruled.

Q. Just describe it, Mr. White. [90]

A. This shows the upper part of the skip, and it shows the cable going down, and also shows the signal cord, which is attached to the switch, controlling

(Testimony of Rush J. White.)

the flash-light. It also shows the earth and the curbing at the side of the raise as you look into it from the number four level.

Q. The angle at which that car stands, at which that car is shown there, shows the angle of the incline of the raise, does it not? A. Yes, sir.

Q. And the incline at which that car stands upon the rails in that raise?

A. Yes, sir. The bottom of the photograph is level. It was taken with the camera level.

Q. What is marked there "bottom" is bottom?

A. Yes, that is the bottom, and that would represent a horizontal line.

Q. Does that show the entire skip?

A. It shows the upper half.

Q. Why don't you show the other half?

A. The other half would be concealed by the lower limit of the opening into the skipway; the skip is so long that you can't show it all from the drift.

Q. It would be impossible to show in one picture.

A. Well, you couldn't show it anyway, not from this position you couldn't show it.

Q. I will ask you to state if you know whether or not that is the skip which was used at the time that the plaintiff was injured.

A. No, I don't know that this is the identical skip; those things are changed occasionally; I don't know that it is the identical skip. [91]

Q. Is it a similar skip?

A. It is a similar skip, yes.

Q. With reference to the bail?

(Testimony of Rush J. White.)

A. The bail is similar.

Q. Similar?      A. Yes.

Q. In size?

A. It is similar in size and shape and function, and all that sort of thing; they are all built alike.

Q. They are all built alike?

A. Yes. I didn't say that I took the photograph.

Q. Well, I was going to ask you about those things. Now, when did you take that photograph, Mr. White?

A. I took it on the 22d of August, 1912.

Q. Last year?      A. Yes, sir.

Q. The conditions surrounding the raise at that point were similar to the conditions as they existed at the time of the accident?

A. Yes; there has been no change.

Q. You show there a rope or string above the skip. What is that?

A. The straight one is the cable that hauls the skip up. The curved one is the signal cord attached to the switch, which operates the flash-light.

Q. Now, Mr. White, how long have you been following mining?      A. About ten years.

Q. How long have you been chief engineer for the Federal Mining Company?      A. Since 1907.

Q. Now, how many mines has the Federal Company up there in [92] operation, and has it had, during the time that you have been the chief engineer?

Mr. MILLER.—I object to that as immaterial.

The COURT.—Overruled.

(Testimony of Rush J. White.)

A. We have at the present time in operation three properties. We formerly had another one, which has since closed down, and at other times we have had in operation nonproducing properties, a number of them.

Q. You have become familiar with hoists in the Federal mines, have you not?     A. Yes, sir.

Q. And the system by which they are operated?

A. Yes, sir.

Q. And have you seen hoists in the other mines around there?     A. Yes, sir.

Q. The Hecla, and the Hercules, and the Snow-storm, and all those other mines?

A. All the operating mines in the Coeur d'Alenes I am familiar with.

Q. What would you say as to whether or not in the other mines hoists of this character are operated by means of light signals?

A. Timber hoists are always operated by means of signals, usually less efficient than this.

Q. What would you say, for the purpose for which this hoist was intended and used, whether or not this was a sufficient system of signals?

Mr. MILLER.—I object.

The COURT.—Yes, that is a rather double question.

Q. For the purposes for which this was used, what would you say as to whether or not it is a proper system of signals? [93]

The COURT.—Ask him the usual system.



(Testimony of Rush J. White.)

Q. Is that the usual system used in mines of that character?

A. Yes, this is usual; it is unusually good for a hoist of that particular character.

The COURT.—That isn't quite the question. The question is, if it is used for carrying men, is it the usual one. I understood your question to be that, and of course if you did not intend the question to go to that extent—

Mr. FOX.—I can make it go to that extent, if the Court please.

Q. If men are hoisted upon this particular kind of hoist, Mr. White, would that be the usual system that is employed there of signals?

A. Well, that is a little bit hard to answer directly, because conditions vary so much at different places, and it is difficult to answer that yes or no without qualification.

Q. Then answer it yes or no, and then qualify it the best you can.

A. Well, I will have to answer no, for the reason that ordinarily men are not handled in a place of this kind; it was merely in this case, as an accommodation to the men themselves.

Mr. MILLER.—I move to strike that answer, as not responsive.

Mr. FOX.—I think it is quite responsive, if the Court please.

The COURT.—Yes, I think that is a conclusion. It will be stricken out.



(Testimony of Rush J. White.)

Mr. FOX.—What portion of the answer, if the Court please? [94]

The COURT.—That part in which he states that they were permitted to use it, or did use it, as a matter of accommodation to them, that is, the workmen.

Q. How did they get to using this hoist? Just state the circumstances.

A. It was a few hundred feet closer to their place of work than the ordinary hoist by which men were hoisted previous to this time and since, and as a matter of accommodation to the men they were allowed to ride on that skip.

Q. You heard the testimony of the plaintiff, did you not, Mr. White? A. Yes, sir.

Q. Now, I will ask you what your opinion is as to whether or not this accident would have occurred if the plaintiff had ridden inside of the skip.

Mr. MILLER.—I object to that as calling for a conclusion of the witness, and irrelevant, incompetent and immaterial.

The COURT.—Sustained.

Mr. FOX.—An exception. That is all.

Cross-examination.

(By Mr. MILLER.)

Q. How long had the men been riding in this skip, Mr. White?

A. I don't remember the exact date when the White raise was first opened, but it was only a few months, a short time.

Q. That is, they began riding in it immediately after the White raise was opened?

(Testimony of Rush J. White.)

A. I presume so.

Q. And the men that rode in it were working for the company?     A. Yes, sir. [95]

Q. And the skip was owned by the company?

A. Yes, sir.

Q. And the company furnished a hoist man to elevate them?     A. Yes, sir.

Q. And have known ever since that they have been using it?     A. Yes, sir.

Q. And you say that for a skip of this character, that carries the number of men that it does, that you wouldn't say that was a safe signal?

A. I didn't say that.

Q. What did you mean? You answered "no," didn't you?

A. I said that for a skip of this character it was a safe signal.

Q. Where men are hoisted?

A. It is a perfectly safe signal where men are hoisted; where a few men are hoisted it is a perfectly safe and adequate signal.

Q. What do you mean by a few?

A. Fifteen or twenty-five men, or thirty.

Q. Well, where they are raising say a hundred each way a day?

A. We don't do that in that kind of—

Q. I say, if they do.     A. They don't.

Q. I say if they do, would you say it was safe?

A. I have never seen a case of that kind though.

Q. Now answer the question.

A. Yes, it would be, if operations were conducted

(Testimony of Rush J. White.)

slowly enough, and under the same conditions that they were conducted here.

Q. Why isn't it a safe signal?

A. It is a safe signal.

Q. You say for a few men. Why do you limit it?  
[96]

A. I limit that as a matter of time, not as a matter of number.

Q. What did you mean?

A. I mean that if the time consumed in hoisting a skip-load of men is sufficient to allow proper operation of the hoist and of the signals the system is perfectly adequate.

Q. Well, what do you mean as to the way you operated it,—was it safe?     A. Yes.

Q. They operate it there at about 300 feet a minute, don't they?

A. I don't know; if it was, it was too fast.

Q. It wouldn't be a safe signal at that rate of speed?

A. We wouldn't allow a hoist of that kind to be operated at that rate of speed.

Q. It wouldn't be a safe system at that rate of speed?     A. No.

Q. At what rate of speed would it be safe?

A. At about 200 feet a minute it would be safe enough.

Q. For how many men?     A. Five men on a skip.

Q. At what rate of speed would it be safe for six?

A. It wouldn't be—it is not proper for six men to ride on hoists of that kind.

(Testimony of Rush J. White.)

Q. You know they always did, don't you?

A. No, I don't.

Q. You never saw six?      A. No.

Q. Never did?      A. No, sir.

Q. And it has been operated since when? [97]

A. This particular hoist since I believe about a year ago the first of the year some time, about the first of the year, I would judge.

Q. The year 1912?

A. Yes, beginning of 1912; that is my recollection.

Q. Well, the safety of a signal system depends on the ability of the men riding in it and the man operating it to control it, does it not?      A. Certainly.

Q. What would you say of a system like this, where you give the signal from above and they don't get it below?

A. If the signal were given above it would be received below.

Q. But if it were given above and wasn't received below, what would you say?

A. The signal couldn't possibly be given above without manifesting itself below.

Q. Now, answer the question. If it were given above and wasn't received below, what would you say as to the sufficiency of it?

A. That is an impossible condition, under the circumstances. When you break an electric circuit with lights in it the lights are bound to flash.

Q. In this case if they didn't—

A. I didn't see it; I don't know that it didn't.

Q. Well, but if this skip, when the signal was given

(Testimony of Rush J. White.)

above, didn't respond below, there would be something wrong with it?     A. Oh, yes.

Q. And a system of that kind wouldn't be good, would it?     A. I don't admit that the—

Q. I say a system of that kind wouldn't be good, would it?     [98]

The COURT.—That is, assuming that the facts are as stated by counsel, Mr. White, that is, that the signal was given above and it was not received below.

A. That wouldn't be good.

The COURT.—Would that indicate some defect in it, or what?

A. Any defect in the signaling system would be manifested by the lights going out entirely, and there would be—it would be impossible to signal. If the circuit was broken that would be manifested by the lights going out and the whole system would be dead.

Q. Then if, in passing a station, the party who attempted to give the signal from above was unable to reach the cord in time, that might also cause a failure of signal?     A. Yes, sir.

Q. An indicator on a hoist would show the position of the skip at every minute?

A. Not necessarily; an indicator is not an absolute control.

Q. But it is an assistance?

A. It is an assistance as an approximate location.

Q. Ordinarily, they use them in well-regulated mines for hoists, don't they?

A. Not for hoists of this character, no.

Q. Well, where men are raised?



(Testimony of Rush J. White.)

A. In general at an operating shaft indicators are used, yes; at an operating shaft or raise indicators are used.

Q. Is there any reason why they can't be used on any hoist that elevates men?

A. No; no reason in the world. [99]

Q. And that is an additional safeguard for the hoistman and the man in the skip? A. Yes, sir.

Mr. MILLER.—That is all.

Mr. FOX.—That is all.

**[Testimony of Henry G. Bishop, for Defendant.]**

HENRY G. BISHOP, duly called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. State your name. A. Henry G. Bishop.

Q. Where do you reside? A. Wardner, Idaho.

Q. What is your business or occupation?

A. Shift boss for the Federal.

Q. How long have you been shift boss for the Federal?

A. For the biggest part of over nine years.

Q. That is at the Last Chance mine?

A. Yes, sir.

Q. The mine in which the plaintiff was hurt?

A. Yes, sir.

Q. Since the White raise has been put in there what kind of skips have they had in there?

A. They have a regular timber skip in there.

Q. Has there been a different character of skip in there of any kind?

(Testimony of Henry G. Bishop.)

A. Not to my knowledge; the timber skips are all made on the same pattern. [100]

Q. All the same? A. Yes, sir.

Mr. FOX.—That is all.

Mr. MILLER.—That is all.

**[Testimony of Charles Sidney Parks, for  
Defendant.]**

CHARLES SIDNEY PARKS, duly called and sworn as a witness in behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. State your full name.

A. Charles Sidney Parks.

Q. Where do you reside? A. Wardner, Idaho.

Q. What do you do? A. I have been mining.

Q. Do you know the plaintiff in this case, Mr. Hodge? A. Yes, sir.

Q. Did you go to work with him about in October at the Tyler Lease? A. Yes, sir.

Q. 1912, that would be? A. Yes, sir.

Q. How long did you work with him at the Tyler Lease? A. Threé or four months.

Q. That is, until he left there and went over to the Caledonia? A. Yes, sir.

Q. During that time how often was he off, if you remember? A. Well, three or four times, I guess.

[101]

Q. How long at a time would he be off?

A. Well, a day, I guess.

(Testimony of Charles Sidney Parks.)

Q. A day at a time?

A. One day he was off a day and a half.

Q. And the rest of the times he would be off a day, would he or not?

A. No, he wouldn't be off any more than a day, that I know of.

Q. What reason did he give for getting off?

A. He had the piles.

Mr. FOX.—That is all.

M. MILLER.—That is all.

**[Testimony of Cecil James Walker, for Defendant.]**

CECIL JAMES WALKER duly called and sworn as a witness in behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. What is your name?

A. Cecil James Walker.

Q. Where do you reside?      A. Wardner, Idaho.

Q. How long have you resided there?

A. About 14 months.

Q. And where were you employed in February and March and April and May, 1913?

A. In the Caledonia.

Q. As what?      A. A miner.

Q. You were foreman there, were you not?

A. No, sir. [102]

Q. Were you in charge of a crew of men that drove the raise?

A. No; I couldn't say I was in charge of it; just taking the lead.

(Testimony of Cecil James Walker.)

Q. You were one of the men who did?

A. I took the lead of the raise in driving it.

Q. Do you know the plaintiff, Mr. Hodge?

A. Yes, sir.

Q. Was he there?      A. He was.

Q. And do you remember about the time he came there?      A. Started the same day I did.

Q. When was that?      A. February 4th.

Q. And when did he leave?

A. We finished the night of May 10th.

Q. That is the day he left?

A. We finished that night on night shift.

Q. Was he off at any time during those days?

A. He laid off one day; then he was off five days on account of no timber, and I believe Hodge laid off six days that time; I was off five.

Q. Otherwise he was working there alongside of you, was he?      A. Right along with me every day.

Q. What was he getting a day, if you know?

A. I believe it was \$3.00.

Mr. FOX.—That is all.

Mr. MILLER.—No questions.

Mr. FOX.—I think that is all, if the Court please.

[103]

[**Testimony of O. D. Chism, for Plaintiff (Recalled in Rebuttal).**]

O. D. CHISM, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows, on

(Testimony of O. D. Chism.)

Direct Examination.

(By Mr. MILLER.)

Q. Mr. Chism, how many men during the time you were riding up and down that hoist would ride in the skip? A. Why—

Q. How many at a time?

A. How many at a time?

Q. Yes.

A. Why, six, when there was a sufficient number there to load the skip.

Q. When there was six or more to go up, did they ever take less than six?

A. Yes, I have rode up when there was only two or three, too.

Q. When there were six to go they would all go at once? A. Yes, sir.

Q. And one of them would ride on the bail?

A. Yes, sir.

Q. And that was the invariable rule?

Mr. FOX.—I object.

The COURT.—Overruled.

Mr. FOX.—An exception.

Q. That was the rule, that always one of them rode on the bail? A. Yes, sir.

Mr. MILLER.—That is all.

Cross-examination.

(By Mr. FOX.)

Q. That is a dangerous place to ride, isn't it, on the bail on the skip? [104]

Mr. MILLER.—I object to it as calling for the conclusion of the witness.



(Testimony of O. D. Chism.)

The COURT.—Overruled.

A. I don't know as I would be authority on giving—

Q. A man riding on the bail has got to ride partly on the cable and hold on to the cable, doesn't he?

A. Yes, I think so; I never rode on the bail myself.

Q. You wouldn't take that chance?

A. I never rode on the bail, no.

Q. How long have you been working there?

A. Three years.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. And the only way to get hurt there would be if the skip ran up into the bulkhead, on the bail?

Mr. FOX.—That is calling for a conclusion, if the Court please.

Mr. MILLER.—That is all. [105]

**[Testimony of C. H. Hodge, in his Own Behalf  
(Recalled in Rebuttal).]**

C. H. HODGE, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. During the time they went up and down in this skip, how many men have always occupied the skip?

A. Six.

Mr. FOX.—I think that has been answered, and it is a question on the direct case, and not proper rebuttal.

(Testimony of C. H. Hodge.)

Q. Did you see other persons than yourself ride on the bail?

A. I did, yes, sir; it is customary for one man to ride on the bail.

Mr. MILLER.—That is all.

Mr. FOX.—I move that the answer be stricken out. I should have liked to have on the record my objection to that class of testimony, as to the custom there.

The COURT.—The objection is overruled, and you may have your exception. Do you desire to cross-examine him?

Mr. FOX.—No, I think not. That is all.

Mr. MILLER.—We rest.

Mr. FOX.—We rest.

The COURT.—The clerk advises me that no answer has ever been filed in the case.

Mr. FOX.—It must have been filed.

Mr. MILLER.—Mr. Morrison said he was unable to find one.

The COURT.—Does your record show the filing of the answer, Mr. Clerk?

The CLERK.—No, sir. [106]

Mr. FOX.—The answer was certainly prepared.

Mr. FEATHERSTONE.—If your Honor please, I sent the answer to Coeur d'Alene to Mr. Gray's office, and they notified me that they had served it on Mr. Morrison and filed it.

The COURT.—It may have been inadvertently overlooked.

Mr. FEATHERSTONE.—When I was here at the

first of the term the clerk informed me that the answer was filed in this case.

The CLERK.—I did?

Mr. FEATHERSTONE.—Yes, sir.

The CLERK.—I think you are mistaken.

Mr. MILLER.—They can substitute their copy; I don't care.

The COURT.—Perhaps you would better substitute a copy now. I haven't been able to see the answer yet.

The CLERK.—I told him the answer in the Warren case was filed.

Mr. FEATHERSTONE.—The answer in the Warren case wasn't here at that time.

The COURT.—The clerk usually charges for any filings, and apparently he hasn't charged for this; the presumption is against you, Mr. Featherstone.

Mr. FOX.—Here is a copy, if your Honor please, that may be filed.

The COURT.—It is not important, inasmuch as counsel consents that you may file a copy. This is a correct copy, is it?

Mr. FOX.—This is a correct copy.

The COURT.—About what date was it served? Have you anything to show when it was served? We will have it [107] filed as of that date.

Mr. MILLER.—April 30th.

The COURT.—Of this year?

Mr. MILLER.—Yes.

The COURT.—You may address the jury, gentlemen. If you have any requests you would better

hand them up now.

Mr. MILLER.—I have been working day and night on a case down at Spokane, and I didn't expect to reach this until to-morrow. I presume, however, that your Honor won't instruct the jury until after dinner?

The COURT.—Well, probably not.

(Argument by counsel.)

(Adjourned until 7:30 P. M.) [108]

**[Instructions.]**

7:30 P. M.

The COURT.—Gentlemen of the jury, as you understand, the plaintiff brings this action to recover damages from the defendant upon the theory and upon the assertion that the defendant was guilty of negligence in its maintenance of what is referred to in the evidence as a skip or skipway which was used by the employees of defendant in passing to and from the underground workings in defendant's mine. The first inquiry, therefore, is whether or not the claim in this respect is substantiated by the evidence. There are several issues upon which you are to find, provided you find that the defendant was guilty of negligence, but this is the first question to which you should give your attention: Was the defendant guilty in the maintenance of this skip in the condition in which you find from the evidence it was? As has been stated by counsel, negligence is usually defined as the doing of something which, under like circumstances, an ordinarily reasonable and prudent person would not do, or the leaving undone of something



which, under like circumstances, ordinarily prudent persons would do. It is conduct which differs from that of ordinarily reasonable and prudent persons under the existing circumstances. The particular claim, as I understand it, is that the negligence consisted in maintaining this skip and operating it without installing and using an indicator by which the man in charge of the engine or the hoist could determine from time to time as the skip was in motion just where it was. Apparently the indicator referred to is a means by which the engineer can read the progress of the car or skip either as it goes up or as it comes down. You have heard the evidence upon this question, and you are to say whether or not in the light of all of this evidence the defendant acted negligently in this respect. It appears from the evidence, or rather there is evidence tending to show, that this device or [109] instrumentality was installed originally or primarily as a carrier for freight, and not as a carrier for passengers. If it was only *of* carrier of freight, and if the plaintiff here and others used it wrongfully for the purpose of going into and coming out of the mine, then the defendant would not be liable for any injury which might have ensued unless it was through the wilful conduct of its employees, and there is no charge of wilfulness here; it is merely negligence. However, if you further find from the evidence that after this tram or car was installed the employees of the company working in that part of the mine found it convenient for their use in making their entrances into and their exits from the mine, and if they used the



car for this purpose with the knowledge and consent of the company, then you should find that the use was not wrongful, and the liability of the company would be substantially the same as if the car had been built for this purpose; that is, such use by the employees coupled with the consent of the employer would be equivalent to an express arrangement by which the employees were to be carried into the mine and out of the mine in this way. However, if you find that the company did thus, either expressly or impliedly, assent to such use, you should bear in mind that the evidence does not show, at least expressly show, the assent of the company to any particular manner or mode of use. Here, for instance, was an instrument which some of the witnesses state was intended primarily for the carriage of freight; it was not fitted up in such a way as to be of the best pattern or design for the carriage of passengers; at most it appears to have been crudely adapted or adaptable for that purpose. So that you have come to another consideration, of which I shall speak a little later, and that is, as to whether or not the evidence warrants you in finding that the company ever knew of or assented to the use of this car or skip in the manner in which the plaintiff was using it, the particular manner in which he was using it at the time of the accident; that is, whether the company ever knew of or assented [110] to any employee riding in the particular place where the plaintiff was when he was injured.

But before commenting upon that consideration, which involves also the questions of assumption of

risk and of contributory negligence, let me say that if you find that the defendant was negligent in the maintenance of this device without some additional means or provision for signaling, or for giving information touching the progress of the car, your next inquiry should be whether or not such negligence was the proximate cause of the accident. If you find that there was negligence, and that that negligence on the part of the defendant contributed to the accident, the next inquiry is as to whether or not the plaintiff himself was guilty of a want of ordinary care. A failure upon the part of the plaintiff to use ordinary care is called contributory negligence, and the general rule is that if the defendant is negligent, and that negligence contributes to the injury, and if the plaintiff is also negligent, and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff himself at that time. The mere fact that others may have ridden in the same position which he occupied that day is not conclusive of the question of his negligence or want of negligence. We know that not infrequently men, in considerable numbers even, take hazards. Especially when they are working around dangerous machinery, or are handling dangerous instrumentalities, they become somewhat used to these things, and are willing to take risks that they should not take. And you should in consideration consider well the particular form of this skip or car, how it is attached to the cable, how it operates, its size, and the exact manner in which the plaintiff was located upon it at the time,

the manner in which he received the injury, and say whether or not a reasonable man,—I mean an ordinarily reasonable man, one of ordinary [111] prudence, would have taken the chances or taken the risk or occupied the position which he did upon that car. You should also take into consideration, as another circumstance, the fact that some others used it, and the testimony of one of the witnesses that while he had ridden upon this car, I think, for something like three years, he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in occupying that position at the time of the accident.

Then there is a still further consideration, and it arises in this way: It is often stated to be the rule, and it is the rule, that it is a primary duty of the master, or employer, to provide a reasonably safe place for the employee to work, and also to provide him with reasonably safe appliances and tools, used in or in connection with his work. You will bear that in mind as being an obligation of the employer at all times, under all circumstances. He is to exercise reasonable care and prudence and intelligence in making this provision for the safety of his employees. That doesn't mean, of course, that an employer is an insurer. He may make mistakes; sometimes he may, as a reasonably prudent man, overlook a defect or err in his judgment; but he must exercise ordinary and reasonable care and prudence.

Now, then, upon the other hand, there is this other

principle, that if I go into your employ, and I am advised of the existence of certain defective conditions, or, if I am not expressly advised of those conditions, but know of their existence, or, through the exercise of my ordinary faculties, I could know of them, and if, in addition to that, I am, by reason of my intelligence and experience able to appreciate the possible danger from such conditions, then the rule is that I impliedly consent to work under those conditions, and I agree to assume whatever risk arises [112] out of them. I think I illustrated that, to some of you, at least, a few days ago: In the case of an ordinary axe, for instance, if you employ someone to chop wood, and the axe handle is cracked, but not entirely broken, and you call the man's attention to the fact that the axe handle is broken, and is likely to break in two, he must be careful, and if he is of sufficient age and intelligence to appreciate the possible danger, if he continues to use it under those conditions, he assumes the risk of any injury which may result. On the other hand, if he doesn't know of the existence of the defect, or if for any reason he should not be held to be able to appreciate the probable or possible danger from that defect, then he cannot be held to have agreed to assume the risk. He can't be held to assume that which he doesn't know of or doesn't appreciate. The principle, which I have illustrated in this homely way, is applicable to all of these personal cases. So here, if the mechanism of this instrumentality in all of its parts was open to the plaintiff, and if he knew about these conditions of which he now complains, and if, by reason of his



age and intelligence and experience, he was able to appreciate the danger, then he should be held to have agreed to assume any risk of danger to himself, and, of course, if you find that, knowing of such danger and appreciating it, he placed himself upon the car or skip in such a way as needlessly to subject himself to the danger, then he would be guilty of contributory negligence.

The burden is upon the party who asserts the existence of a fact to prove the fact by a preponderance of the evidence; so that in this case the burden was upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent in the respects referred to, and that that negligence contributed to the injury. Having done so, he makes a *prima facie* case. Upon [113] the other hand, the burden is upon the defendant to plead and prove assumption of risk, as I have defined it to you, and also to prove contributory negligence. The defendant here has alleged in its answer, which was not read to you, that the plaintiff assumed the risk, and also was guilty of contributory negligence, and the burden was upon it to establish these defenses by a preponderance of the evidence.

### **Exceptions.**

Mr. FOX.—We desire to except to the refusal of the Court to grant our requested instruction which is in the words following: “You are instructed to find a verdict for the defendant in this case,” for the reason that it appears from the evidence in this case adduced both on behalf of the plaintiff and on behalf of the defendant, that there was no actionable



negligence on the part of the defendant causing the injury complained of in plaintiff's complaint; that if the plaintiff was injured as claimed in his complaint, the injury was caused by his own want of care, and negligence, and that the evidence shows that he assumed the risks of the employment.

We object and except to the charge of the Court wherein the Court calls the attention of the jury to the fact that they may take *consideration any* custom which existed on the part of the employees of the defendant in riding upon the bail or cable of the skip in the manner in which the plaintiff rode upon the occasion and just prior to the accident which happened to him, for the reason that such custom, or the knowledge on the part of the plaintiff of such custom, does not exonerate the plaintiff from the charge of contributory negligence and assumption of risk. (Exceptions to instructions.)

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the [114] Judge who presided in said court at the trial of the case of C. H. Hodge, plaintiff, vs. The Federal Mining & Smelting Company, defendant, tried in said court on the 11th day of June, A. D. 1913, and ending on the said day, do hereby certify that the foregoing Bill of Exceptions was handed me by the Clerk of the Court on the 16th day of September, A. D. 1913, for settlement, and it appearing to me that the same has been, within the time allowed by law and within the time allowed by an order of the Court extending such time, served upon the attorneys for the plaintiff together with no-

tice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified, and the instructions given by the Court and all the exceptions taken by the defendant to the admission of testimony, and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct bill of exceptions in this case, and I hereby certify that the same with the exhibits separately certified but made a part hereof contains all of the evidence produced at the trial. The clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions.

Dated at Boise, Idaho, this 17th day of September, A. D. 1913.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed Aug. 7, 1913. A. L. Richardson, Clerk. Refiled Sept. 18, 1913. A. L. Richardson, Clerk. [115]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
Defendant.

**Order [Extending Time to August 26, 1913, to  
Present Bill of Exceptions].**

Sufficient cause appearing therefor,—

It is hereby ORDERED that the defendant, Federal Mining & Smelting Company, have fifty days in addition to the time allowed by law and by the order of this Court, entered at the time of the trial herein, to wit, until the 26th day of August, A. D. 1913, within which to present for settlement its bill of exceptions to the errors occurring at the trial of the said cause heretofore filed herein.

Dated at Boise, Idaho, this 9th day of August,  
A. D. 1913.

FRANK S. DIETRICH,  
District Judge.

Filed Aug. 9, 1913. A. L. Richardson, Clerk. By  
E. B. Yarrington, Deputy. [116]

**[Acceptance of Service of Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
Defendant.

Service of the defendant's proposed Bill of Exceptions in the above-entitled action is hereby accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 8th day of August, A. D. 1913.

ROBERTSON & MILLER,  
W. F. MORRISON, Jr.,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 11, 1913. A. L. Richardson, Clerk. [117]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Copy.

AT LAW.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Petition for Writ of Error.**

Comes now Federal Mining & Smelting Company, a Corporation, defendant herein, and says that on or about the 11th day of June, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FEATHERSTONE & FOX,

Attorneys for Defendant.

Residence and postoffice address—Wallace, Idaho.

[Endorsed]: Filed Aug. 26, 1913. A. L. Richardson, Clerk. [118]



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Copy.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING  
COMPANY,

Defendant.

**Assignments of Error.**

I.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination, with reference to the custom existing as to the number of men who should ride upon the skip, to wit:

Q. Any custom?

for the reason that the defendant was not bound by any such custom, if the same existed, and was not bound even by a direction to the men that any particular number should ride upon the said skip. Which objection was overruled by the Court; to which ruling of the Court the defendant, then and there, by counsel duly excepted, which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

II.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination as to the custom

existing among the miners, with reference to the number of men who rode upon the said skip, to wit:

Q. Always?

for the reason that the defendant was not bound in this case by any such custom and was not even bound by a direction to the men that any particular number should ride thereon. Which objection [119] was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

### III.

The Court erred in overruling the defendant's objection to the following question asked the witness, Nick Petrinovich, on direct examination, to wit:

Q. Any Bell system of signalling?

for the reason that it was not shown that the defendant had an insufficient system of signalling, but it was shown on cross-examination of witnesses that the signalling worked perfectly on all occasions except this one. The sufficiency of a system of signalling is a question of fact for the Court to determine and not a question for the jury to determine. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

### IV.

The Court erred in overruling the objection of the defendant to the following question asked the wit-

ness, Harry Martin, to wit:

Q. What was the condition of the cable on this hoist?

for the reason that the condition of the cable on this hoist could not possibly be the cause of this injury. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there duly excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

V.

The Court erred in denying defendant's motion for a nonsuit made at the close of plaintiff's evidence in the case, because [120] the evidence adduced by the plaintiff was insufficient in the following particulars, to wit:

(a) The evidence did not show any negligence on the part of the defendant which was the approximate cause of the injuries sustained by the plaintiff.

(b) Upon the ground that, if the accident occurred by reason of anyone's negligence, it was by reason of the negligence of a fellow servant, namely, the hoistman, and the other men in the skip who failed to give the signal, or the negligence of both the men in the skip and the hoistman.

(c) The plaintiff by his own testimony has shown that he was guilty of contributory negligence and assumed the risk by placing himself in an obviously dangerous position, to wit, upon the bail and cable of the skip, whereas a safe position was open to him; which motion was denied by the Court; to which ruling of the Court the defendant by counsel, then and

there, duly excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

## VI.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on the direct examination of the said witness in rebuttal, to wit:

Q. And one of them would ride on the bail? for the reason that it was improper to show what the custom in this respect might be among the men of riding upon the bail. Which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error. [121]

## VII.

The Court erred in overruling defendant's objection to the following question asked the witness, O. D. Chism, on direct examination in rebuttal, relative to the rule which existed among the men that one of them would ride upon the bail, to wit:

Q. And that was the invariable rule? for the reason that the defendant in this case was not bound by any rule or custom existing among the men of riding upon the bail. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.



## VIII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant in this case as requested by the defendant for the following reasons, to wit:

(a) It appears from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint.

(b) That, if the plaintiff was injured as complained of in his complaint, the injury was caused by his own want of care and his own negligence, and he assumed the risk of his employment; which said motion was denied by the Court; to which said ruling of the Court the defendant by counsel, then and there, excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

## IX.

The Court erred in giving the following portion of his oral instruction to the jury, to wit:

"The failure upon the part of the plaintiff to use ordinary care is referred to as contributory negligence and the general [122] rule is that if the defendant is negligent and that negligence contributes to the injury, and if the plaintiff is also negligent and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff at this time. The mere fact that others may have ridden in the same position that he occupied that day is not



conclusive of the question of his negligence or want of negligence. We know that not infrequently men in considerable numbers even, take hazards, especially when they are working around dangerous machinery, or are handling dangerous instruments; they become somewhat used to these things and take risks that they should not take. And you should consider well here the particular form of this skip or car,—how it was attached to the cable; how it operated, its size, and the exact manner in which the plaintiff was located upon it at the time, the manner in which he received the injury, and say whether or not a reasonable man—I mean an ordinarily reasonable man of ordinary prudence—would have taken the chances, or taken the risk, or occupied the position which he did, upon that car. You should, in addition to that, take into consideration as one circumstance, that some others used it, and the testimony here of one of the witnesses that while he had ridden upon that car, I think for something like three years, he stated that he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in taking that position at the time of the accident.”

To which portion of the said oral charge of the Court to the jury, and specifically that portion wherein the Court called the attention of the jury to the fact that they might take into consideration any custom which had existed on the part of the employees of the defendant in riding in the position in which the [123] plaintiff was riding upon the said

skip at the time of the said injury, to wit, upon the bail or the cable of the said skip, the defendant by counsel, then and there, duly objected and excepted for the reason that such custom did not exonerate the plaintiff from his contributory negligence, and assumption of risk by him; which said exception was duly allowed by the Court; and which said action of the Court in giving the said portion of the said instruction, the defendant now assigns as error.

**SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND JUDGMENT THEREON.**

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to wit:

(a) There is no evidence of any negligence on the part of the defendant which was the approximate cause of the injury to the plaintiff. While the evidence discloses that this particular hoist did not have any indicator upon it, at the same time it appears that the equipment of the hoist and the signalling system had always been, and was then, sufficient for the purpose for which it was used, had proper use thereof been made by the fellow-employees of the plaintiff. The evidence further discloses that the approximate cause of plaintiff's injuries was the fact that he was sitting and riding upon the bail and cable of the skip and that he would not have been injured in this accident but for the fact that he assumed an obviously dangerous position in which to ride

**Order Allowing Writ of Error.**

This 18th day of September, 1913, came the defendant by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of Three Thousand Dollars, which shall operate as a supersedeas bond.

Dated this 18th day of September, 1913.

FRANK S. DIETRICH,

Judge of the United States District Court for the District of Idaho.

[Endorsed]: Filed Sept. 18, 1913. A. L. Richardson, Clerk. [127]

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*In the District Court of the United States for the District of Idaho, Northern Division.*

Copy.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING & SMELTING COMPANY,

Defendant.

**Order to Transmit Original Exhibits.**

It appearing that a writ of error has been prayed for and allowed from the United States Circuit Court of Appeals to the above-entitled court in this cause, and good cause appearing therefor, it is hereby ORDERED that all of the original exhibits in the above-entitled cause be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit. Said Exhibits consisting of 4 glass X-ray plates and 3 photographs.

FRANK S. DIETRICH,  
District Judge.

[Endorsed]: Filed Sept. 23, 1913. A. L. Richardson, Clerk. [128]

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THE AETNA ACCIDENT AND LIABILITY  
COMPANY.

HARTFORD, CONNECTICUT.

MORGAN G. BULKELEY, PRESIDENT.

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,  
a Corporation,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, FEDERAL MINING & SMELTING



COMPANY, a corporation, as principal, and THE AETNA ACCIDENT AND LIABILITY COMPANY, a corporation, organized and existing under and by virtue of the laws of Connecticut, having complied with all the statutes of the United States, authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, C. H. Hodge, in the full and just sum of Three Thousand Dollars (\$3,000.00) to be paid to the said defendant in error, C. H. Hodge, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be paid, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents;

Sealed with our seals and dated this 5th day of August, A. D. 1913.

WHEREAS, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between C. H. Hodge as plaintiff [129] and Federal Mining & Smelting Company, a corporation, as defendant, a judgment was rendered against the said Federal Mining & Smelting Company, upon the verdict of a jury, in the sum of One Thousand Dollars (\$1,000.00), and costs amounting to the further sum of \$166.80;

AND WHEREAS, the said defendant, Federal Mining & Smelting Company, considering it is aggrieved thereby, has obtained from the said Court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said



plaintiff, C. H. Hodge, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California.

NOW, the condition of the above obligation is such that, if the said Federal Mining & Smelting Company shall prosecute the said writ of error to effect and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and is a supersedeas bond.

FEDERAL MINING & SMELTING COM-  
PANY,

By WM. J. HALL,

Its Assistant General Manager and Agent, Principal.

THE AETNA ACCIDENT & LIABILITY  
COMPANY,

[Seal]

By HERMAN J. ROSSI,

Resident Vice-President.

Attest: THERRETT TOWLES,

Resident Assistant Secretary.

The foregoing bond is hereby approved this 18th day of August, A. D. 1913, and the same when filed shall operate both as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH,

Judge. [130]

THE AETNA ACCIDENT AND LIABILITY  
COMPANY.

HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESI-  
DENT VICE-PRESIDENT.

KNOW ALL MEN BY THESE PRESENTS,  
That Herman J. Rossi has been and is hereby ap-  
pointed Resident Vice-President of The Aetna Acci-  
dent and Liability Company, of Hartford, Connect-  
icut, at Wallace, Idaho, and as such Resident Vice-  
President has full power and authority to sign and  
execute, on behalf of The Aetna Accident and Liabil-  
ity Company, any and all bonds and undertakings,  
and all bonds and undertakings signed by him, when  
sealed and attested by a Resident Assistant Secre-  
tary, shall be as valid and binding upon the Com-  
pany as if said bonds and undertakings had been  
signed by the President and duly sealed and attested.

This appointment is made under and by author-  
ity of the following By-Law adopted by the Board  
of Directors of The Aetna Accident and Liability  
Company at a meeting duly called and held on the  
28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTOR-  
NEYS-IN-FACT AND AGENTS.

Section 1. The President, any Vice-President  
or the Secretary may from time to time appoint  
Resident Vice-Presidents, Resident Assistant Sec-  
retaries, Attorneys-in-fact and Agents to represent  
and act for and on behalf of the Company, and  
either the President, any Vice-President, the Sec-  
retary of the Board of Directors may at any time

remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-fact or Agent and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary. [131]

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 21st day of April, A. D. 1913.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

[Seal]

By J. S. ROWE,  
Secretary.

Attest: C. W. MEYERS,  
Assistant Secretary.

State of Connecticut,  
County of Hartford,—ss.

On this 21st day of April, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: that he resides in the city of Hartford, State of Connecticut;

that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal]

JAMES F. McEVITT,  
Notary Public.

My Commission expires Jan. 31, 1914. [132]

THE AETNA ACCIDENT AND LIABILITY  
COMPANY, HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESIDENT  
ASSISTANT SECRETARY.

KNOW ALL MEN BY THESE PRESENTS,  
That Therrett Towles has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford Connecticut, at Wallace, Idaho, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Com-



pany, at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS. Section

1. The president, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-fact or Agent and revoke the power and authority given him. Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President. [133]

IN WITNESS WHEREOF, THE AETNA ACCIDENT AND LIABILITY COMPANY has caused these presents to be signed by its Secretary and its corporate seal to be hereto affixed, duly attested by



142 *The Federal Mining and Smelting Company*  
its Assistant Secretary, this 21st day of April, A. D.  
1913.

THE AETNA ACCIDENT AND LIABILITY  
COMPANY.

[Seal]

By J. S. ROWE,  
Secretary.

Attest: C. W. MEYERS,  
Assistant Secretary.

State of Connecticut,  
County of Hartford,—ss.

On this 21st day of April, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say; that he resides in the city of Hartford, State of Connecticut, that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal]

JAMES F. McEVITT,  
Notary Public.

My Commission expires Jan. 31, 1914.

[Endorsed]: Filed Sept. 18, 1913. A. L. Richardson, Clerk. [134]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Copy.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING COM-  
PANY,

Defendants.

**Praeipce for Transcript.**

To A. L. Richardson, Clerk of the United States Dis-  
trict Court, Boise, Idaho:

Dear Sir: You will please prepare a transcript in  
the above-entitled cause and will include therein:

1. Writ of Error and Citation, Appeal Bond, As-  
signments of Error, and all other papers relating to  
the appeal.

2. Judgment-roll.

3. Bill of Exceptions.

4. Copy of Journal Entries.

5. Everything else in the Record.

FEATHERSTONE & FOX,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 26, 1913. A. L. Richard-  
son, Clerk. [135]

[**Writ of Error (Original).**]

*The United States Circuit Court of Appeals for the Ninth Circuit.*

The United States of America,  
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable  
Judge of the District Court of the United States,  
for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between C. H. Hodge, plaintiff, and Federal Mining & Smelting Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Federal Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 18th day of October next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 18th day of September, A. D. 1913, and in the [136] one hundred thirty-seventh year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,  
United States District Judge.

[Seal] Attest: A. L. RICHARDSON,  
Clerk of the District Court of the United States, District of Idaho. [137]

[Endorsed]: No. 554. The United States Circuit Court of Appeals for the Ninth Circuit. C. H. Hodge, Plaintiff, vs. Federal Mining & Smelting Company, a Corporation, Defendant. Writ of Error. Filed Sept. 18, 1913. A. L. Richardson, Clerk. [138]

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[Citation on Writ of Error (Original).]

*The United States Circuit Court of Appeals for the Ninth Circuit.*

The United States of America,  
Ninth Judicial Circuit,—ss.

To C. H. Hodge, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 18th day of October next, pursuant to a writ of

error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Federal Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, District Judge of the United States, at Boise, Idaho, within said Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

FRANK S. DIETRICH,  
United States District Judge.

I hereby, this 29th day of September, 1913, accept personal service of this citation on behalf of C. H. Hodge, Appellee.

ROBERTSON & MILLER,  
W. F. MORRISON, Jr.,  
Attorneys for Appellee. [139]

[Endorsed]: No. 554. The United States Circuit Court of Appeals for the Ninth Circuit. C. H. Hodge, Plaintiff, vs. Federal Mining & Smelting Company, a Corporation, Defendant. Citation. Filed on return, Oct. 2d. 1913. A. L. Richardson, Clerk. [140]



**Return to Writ of Error.**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]                      Attest: A. L. RICHARDSON,  
Clerk. [141]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING COM-  
PANY,

Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 142, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, excepting the original exhibits which are separately certified and transmitted herewith, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of \$89.60, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of the said District Court, this 2d day of October, 1913.

[Seal]

A. L. RICHARDSON,

Clerk. [142]

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[Endorsed]: No. 2325. United States Circuit Court of Appeals for the Ninth Circuit. The Federal Mining & Smelting Company, a Corporation, Plaintiff in Error, vs. C. H. Hodge, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Received October 15, 1913.

F. D. MONCKTON,

Clerk.

Filed October 15, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

THE FEDERAL MINING & SMELTING  
COMPANY, A Corporation,

Plaintiff in Error.

vs.

C. H. HODGE,

Defendant in Error.

NO. 2325

---

BRIEF OF PLAINTIFF IN ERROR UPON WRIT OF  
ERROR TO UNITED STATES DISTRICT COURT  
OF THE DISTRICT OF IDAHO, NORTHERN  
DIVISION.

---

FEATHERSTONE & FOX,

Wallace, Idaho,

Attorneys for Plaintiff in Error

WALTER F. MORRISON,

Coeur d'Alene, Idaho,

ROBERTSON & MILLER,

Spokane, Washington,

Attorneys for Defendant in Error



UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

THE FEDERAL MINING & SMELTING  
COMPANY, A Corporation,

Plaintiff in Error.

vs.

C. H. HODGE,

Defendant in Error.

NO. 2325

---

BRIEF OF PLAINTIFF IN ERROR UPON WRIT OF  
ERROR TO UNITED STATES DISTRICT COURT  
OF THE DISTRICT OF IDAHO, NORTHERN  
DIVISION.

---

FEATHERSTONE & FOX,

Wallace, Idaho,

Attorneys for Plaintiff in Error

WALTER F. MORRISON,

Coeur d'Alene, Idaho,

ROBERTSON & MILLER,

Spokane, Washington,

Attorneys for Defendant in Error



## STATEMENT OF THE CASE.

The defendant in error, C. H. Hodge, the plaintiff below, sustained an injury on the 7th day of May, 1912, while in the employ of the Federal Mining & Smelting Company, the plaintiff in error, defendant below, in the Last Chance Mine, one of the properties of the plaintiff in error, situate at Wardner, Shoshone County, Idaho. The defendant in error had a complete recovery. (Tr. pp. 39-40.)

The accident occurred while the defendant in error was riding, in a sitting position, upon the bail and cable of a small skip operated in an incline hoistway or shaft in the said Mine, (the incline of this hoistway being about 45 degrees.)

In order to readily understand how this accident occurred it will be necessary to briefly describe the skip and the method of its operation as also in a general way the surroundings. The skip is a little car about 8 feet long and 3 feet wide, which has four wheels that run upon "T" rails. To the top of the skip is attached what is known as a bail, similar to the ordinary bail or handle of a pail. This bail is made of an iron rod about an inch in thickness and is bent in semi-circular shape and would extend about a foot or a foot and a half above the skip. To this bail is attached a cable which passes up the skipway and over a wheel known as a sheave wheel situate at the top of the skipway, and from thence down the skipway again to the drum of a small hoist which is situate on the Swneeney level. The hoist is operated by compressed air. There was no indicator upon the hoist. The only system of signalling provided for the purpose of hoisting and lowering the skip in this skipway was what is known as a "flashlight" system. This consists of a number of sixteen candle power electric lights, one of which is installed at the

hoist, and one at each of the levels, the lights being all connected in a circuit and flashed by means of a cord provided at each level and strung for a distance of about 4 feet lengthwise the incline at the levels, and within easy reach of persons riding upon the skip. This cord is used, both by the men riding upon the skip and such as may be standing at the stations to signal the engineer. When the cord is pulled all the lights go out momentarily and in this way the signal is flashed to the engineer. To prevent the skip from being drawn into the sheave wheel there is placed across the skipway, and between the upper or Number 4 level and the sheave wheel, a piece of timber known as a bulkhead or sheave timber which is about sixteen inches in diameter. (Tr. pp. 41-42-43.) The skipway or raise starts from the Sweeney level and is about 500 feet long. There are two more levels leading into this skipway which are above the Sweeney level, namely, the Numbr 5 or intermediate, and the Number 4 or top level. The skip accommodates five men only, and in case six men endeavor to ride upon it, it is necessary for one of them to sit upon the bail and cable. (Tr. p. 48.)

The men would arrange themselves as follows: Three men would stand on the lower deck and lean against the skip, two stood on the upper deck, which is a piece of timber fastened across the skip about midway. These men also leaned against the skip as the grade of the raise or skipway (about 45 degrees) did not permit of them standing erect, and the sixth man rode sitting on the bail, leaning against the cable, with his feet braced against the top of the skip. This was the position assumed by the defendant in error at the time of the injury (Tr. pp. 47-61-80-84.)

Riding in this position from the Sweeney level the skip was drawn to the Number 5 or intermediate level and the two men

got off. (Tr. p. 50.) At this point defendant in error, had he wished, could have taken a position in the body of the skip. (Tr. p. 50), but he did not do so and the skip was hoisted further. In passing the Number 4 or top level the skip was being drawn so fast that witness Chism could not give a proper signal to stop (Tr. pp. 44-45), and the engineer says that he did not receive any signal (Tr. p. 77). Consequently the skip was drawn past the Number 4 level and into the bulkhead or sheave timber where it stopped. The defendant's leg was pinned in beneath the sheave timber and the skip, and thus the injury occurred (Tr. p. 60-80). The cable did not break (Tr. p. 77). Nobody upon the skip was injured (Tr. pp. 50-51), and had the defendant in error sat in the body of the skip he would not have been injured (Tr. p. 51). His injury was due to the fact that he sat and rode upon the bail and cable instead of in the body of the skip as the other men did.

It is the contention of the plaintiff in error that in voluntarily riding upon the bail and cable of this hoist, the defendant in error assumed what was obviously the most dangerous place that could have been chosen by him, the place where the doctrine of chances would not permit of his riding a given number of times without injury. But further than this, in so doing he was violating a penal statute of the State of Idaho (hereinafter set out verbatim) which positively prohibits everyone from riding upon the bail or cable of any skip. The defendant in error sought to justify his taking this obviously dangerous position, and to excuse his violation of the positive inhibition of this statute, by showing that a custom had existed among the miners of riding on the bail and cable. The jury returned a verdict for the defendant in error in the sum of \$1,000.00 and judgment was entered thereon. To review the judgment this writ or error is brought.

It is contended by the plaintiff in error :

First: That the accident would not have happened but for the fact that the defendant in error assumed this obviously dangerous position in violation of law and that therefore the action of the defendant in error in this respect constitutes negligence *per se* which bars his recovery.

Second: That the Court erred in permitting the introduction, on behalf of the defendant in error, of evidence that a custom existed among the miners of riding on the bail and cable and of violating this law, and that the Court, in this respect, erred in instructing the jury that they should take such evidence into consideration in coming to their conclusion as to whether or not the defendant in error acted as a reasonable and prudent man in assuming such a position.

Third: That the Court erred in admitting evidence as to the insufficiency of the signalling system.

Fourth. That the Court erred in admitting evidence to the effect that the cable was defective.

Fifth: That the proximate cause of the accident was the negligence of a fellow servant, to-wit, of the hoistman in running the skip so fast past the Number 4 level that it was difficult for the men upon the skip to give the signal to stop.

## ASSIGNMENTS OF ERROR.

### I.

The court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination, with reference to the custom existing as to the number of men who should ride upon the skip, to-wit:

Q. Any custom?

for the reason that the defendant was not bound by any such

custom, if the same existed, and was not bound even by a direction to the men that any particular number should ride upon the said skip. Which objection was overruled by the Court; to which ruling of the Court the defendant, then and there, by counsel duly excepted, which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that it was customary for the miners to ride six at a time upon the skip, one of them sitting on the bail and cable (Tr. p. 51.)

## II.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination as to the custom existing among the miners, with reference to the number of men who rode upon the said skip, to-wit:

Q. Always?

for the reason that the defendant was not bound in this case by any such custom and was not even bound by a direction to the men that any particular number should ride thereon. which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that a custom existed among the miners of always riding six on the skip, one of them riding on the bail and cable (Tr. p. 52.)

## III.

The Court erred in overruling the defendant's objection



to the following question asked the witness, Nick Petrinovich, on direct examination, to-wit:

Q. Any bell system of signalling?

for the reason that it was not shown that the defendant had an insufficient system of signalling, but it was shown on cross-examination of witnesses that the signalling worked perfectly on all occasions except this one. The sufficiency of a system of signalling is a question of fact for the Court to determine and not a question for the jury to determine. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that there was no bell system of signals and none except the "flash" system (Tr. p. 57).

#### IV.

The Court erred in overruling the objection of the defendant to the following question asked the witness, Harry Martin, to-wit:

Q. What was the condition of the cable on this hoist?

for the reason that the condition of the cable on this hoist could not possibly be the cause of this injury. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there duly excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection was to the effect that the cable was old and worn (Tr. pp. 77-78).

#### V.

The Court erred in denying defendant's motion for a non-

suit made at the close of plaintiff's evidence in the case, because the evidence adduced by the plaintiff was insufficient in the following particulars, to-wit:

(a) The evidence did not show any negligence on the part of the defendant which the proximate cause of the injuries sustained by the plaintiff.

(b) Upon the ground that, if the accident occurred by reason of anyone's negligence it was by reason of the negligence of a fellow servant, namely, the hoistman, and the other men in the skip who failed to give the signal, or the negligence of both the men in the skip and the hoistman.

(c) The plaintiff by his own testimony has shown that he was guilty of contributory negligence and assumed the risk by placig himself in an obviously dangerous position, to-wit, upon the bail and cable of the skip, whereas a safe position was open to him; which motion was denied by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

## VI.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on the direct examination of the said witness in rebuttal, to-wit:

Q. And one of them would ride on the bail?

for the reason that it was improper to show what the custom in this respect might be among the men of riding upon the bail. Which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection was to the effect that a custom of riding upon the bail and cable existed among the miners (Tr. p. 109).

#### VII.

The Court erred in overruling defendant's objection to the following question asked the witness, O. D. Chism, on direct examination in rebuttal, relative to the rule which existed among the men that one of them would ride upon the bail, to-wit:

Q. And that was the invariable rule?

for the reason that the defendant in this case was not bound by any rule or custom existing among the men of riding upon the bail. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel then and there, excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that a custom existed among the miners of riding on the bail and cable of this skip. (Tr. p. 109).

#### VIII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant in this case as requested by the defendant for the following reasons, to-wit:

(a) It appears from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint.

(b) That, if the plaintiff was injured as complained of in his complaint, the injury was caused by his own want of care and his own negligence, and he assumed the risk of his employment; which said motion was denied by the Court;

to which said ruling of the Court the defendant by counsel, then and there, excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

### IX.

The Court erred in giving the following portion of his oral instruction to the jury, to-wit:

“The failure upon the part of the plaintiff to use ordinary care is referred to as contributory negligence and the general rule is that if the defendant is negligent and that negligence contributes to the injury, and if the plaintiff is also negligent and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff at this time. The mere fact that others may have ridden in the same position that he occupied that day is not conclusive of the question of his negligence or want of negligence. We know that not infrequently men in considerable numbers even take hazards, especially when they are working around dangerous machinery, or are handling dangerous instruments; they become somewhat used to these things and take risks that they should not take. And you should consider well here the particular form of this skip or car,—how it was attached to the cable; how it operated, its size, and the exact manner in which the plaintiff was located upon it at the time, the manner in which he received the injury, and say whether or not a reasonable man—I mean an ordinary reasonable man of ordinary prudence—would have taken the chances, or taken the risk, or occupied the position which he did, upon that car. You should in addition to that, take into consideration as one circumstance, that some others used it, and the testimony here of one of the witnesses that while he had ridden upon that

car, I think for something like three years, he stated that he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in taking that position at the time of the accident."

To which portion of the said oral charge of the Court to the jury, and specifically that portion wherein the Court called the attention of the jury to the fact that they might take into consideration any custom which had existed on the part of the employees of the defendant in riding in the position in which the plaintiff was riding upon said skip at the time of the said injury, to-wit, upon the bail or the cable of the said skip, the defendant by counsel, then and there, duly objected and excepted for the reason that such custom did not exonerate the plaintiff from his contributory negligence, and assumption of risk by him; which said exception was duly allowed by the Court; and which said action of the Court in giving the said portion of the said instruction, the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS  
INSUFFICIENT TO SUSTAIN THE VERDICT  
OF THE JURY AND JUDGMENT THEREON

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence discloses that this particular hoist did not have any indicator upon it, at the same time it appears that the equipment of the hoist



and the signalling system had always been, and was then, sufficient for the purpose for which it was used, had proper use thereof been made by the fellow employees of the plaintiff. The evidence further discloses that the proximate cause of plaintiff's injuries was the fact that he was sitting and riding upon the bail and cable of the skip and that he would not have been injured in this accident but for the fact that he assumed an obviously dangerous position in which to ride thereon. The evidence conclusively shows that if the plaintiff had been sitting inside of the skip instead of upon the bail and cable, he would not have been injured, though the engineer failed to stop the skip at the station where the plaintiff was going to get off, but instead pulled the skip against the timbers, protecting the sheave-wheel.

(b) The evidence conclusively shows that the proximate cause of the plaintiff's injury was the negligence of a fellow-servant or servants. In this respect the evidence discloses that the signalling system provided by the defendant was sufficient for the safe operation of the said hoist. It had been used effectively immediately prior to the happening of the accident and immediately thereafter. That, had the plaintiff's fellow-employees riding upon the skip made proper use of the signal appliances at the time they came to the station where they intended to get off, or had the hoistman paid proper attention to the signal that was given, the accident would not have occurred.

(c) The evidence conclusively shows that the plaintiff voluntarily placed himself in an obviously dangerous position on the said skip, namely, upon the bail and cable thereof; whereas the evidence shows that he need not have placed himself in such a position, but could have ridden in the body of the skip. The evidence discloses further that a number

of men riding upon the said skip got off at the first level, and that there was ample room for the plaintiff in the body of the skip after these men had gotten off, but nevertheless he failed to avail himself of the opportunity to ride in a safe place in the skip, but continued to ride upon the bail and cable thereof. The evidence conclusively shows that no one upon the skip but the plaintiff was injured in this accident and that if he had ridden in the skip instead of upon the bail and cable, he would not have been injured. Consequently the plaintiff was guilty of negligence *per se* and assumed the risk, as a matter of law.

### ARGUMENT.

The assignments or error may be grouped into five propositions and will be taken up in the following order:

FIRST PROPOSITION: The defendant in error was guilty of contributory negligence *per se* in riding upon the bail and cable of the skip, his so doing being the proximate cause of the accident and his consequent injury, or so far contributed thereto as to charge the defendant in error with contributory negligence as a matter of law. Under this head are grouped assignments of error Numbers V, (a-c), VIII, (a-b), together with specifications of the insufficiency of the evidence to sustain the verdict (a-c).

SECOND PROPOSITION: Error of the Court in admitting evidence as to the custom of men riding upon the bail and cable and the Court's instruction to the jury in reference thereto comprising assignments in error I, II, VI, VII and IX.

THIRD PROPOSITION: Error of the Court in admitting in evidence the fact that there was no bell system

or other system of signalling than the flashlight system covered by assignment of error Number III.

FOURTH PROPOSITION: Error of the Court in admitting evidence of the condition of the cable on this hoist covered by assignment of error Number IV.

FIFTH PROPOSITION: The accident was caused by the negligence of a fellow servant. Under this head is grouped assignment of error Number V (b) and specifications of the insufficiency of the evidence to sustain the verdict (b).

### FIRST PROPOSITION.

The main ground relied upon by the plaintiff in error to reverse this case is that the defendant in error in sitting and riding upon the bail and cable of this skip assumed not only an obviously dangerous position, but the most dangerous position which could have been assumed by him, and in doing so he violated the positive prohibitions of a penal statute of the State of Idaho. As has been seen, the skip itself accommodated but five persons (Tr. p. 48). The defendant in error was riding upon the bail and cable (Tr. pp. 46-47-61-80-84): hence the defendant in error was not riding within or upon the skip, but outside of it on a bent piece of iron, fastened to the skip, and known as the bail, and as he himself testifies that in riding upon the bail it was necessary for him to lie upon the cable (Tr. pp. 80-84). That this is obviously the most dangerous place for a person to ride cannot, to our minds, be questioned, for the reason that none of the men riding in the skip were hurt (Tr. p. 50), and the defendant in error would not have been injured had he ridden inside of the skip (Tr. p. 51). Further than this, he had an opportunity of leaving his place on the bail

and cable and taking a seat within the skip after two of the men had gotten off on the fifth level (Tr. p. 50). Obviously any jar or slackening of the cable would throw a person, so riding, off, and put him in peril of being crushed or run over. His exceedingly cramped position does not give him any opportunity of avoiding these dangers. As in this case, the defendant in error obviously placed himself in a position where he could not help but be crushed in case the skip was hoisted too high or into the sheave timbers. That accidents of this kind, namely the drawing of the skip into the sheave timbers, do sometimes happen, is well known, both to the mine owners and to the employes and therefore precaution against the more serious accidents of drawing the skip into the sheave wheel has been taken by placing protecting timbers between the upper level and the sheave wheel (Tr. p. 45). Ordinary prudence suggests this course and everyone who is engaged or employed is familiar with these conditions.

But, aside from this, the extreme danger of occupying a position upon a bail or cable in riding up and down these hoistways has been taken cognizance of by the Legislature of the State of Idaho, which at its Tenth Session enacted a law proclaiming such danger, as a matter of public policy of the State of Idaho, thereby prohibiting any person from riding in such a position under the penalty of the law which makes such act a misdemeanor, and punishable as such. This act is found on Page 269, General Laws of 1909, Sec. 20, which reads as follows:

"It shall be unlawful for any person whether working for himself or whether he is in the employ of any other person, company or corporation, to ride upon the bail or cable of a hoistig bucket, cage or skip."

Therefore, our first proposition presents two phases, namely :

(A) The defendant in error assumed such a dangerous position which caused, or at least contributed, to his injury, that at common law and irrespective of the statute prohibiting him from riding in such position he is deemed to be guilty of negligence *per se* which prohibits him from recovering in this case.

(B) That at the time of being injured he was violating a positive statute of the State of Idaho in riding upon the bail and cable, which position caused, or at least contributed, to his injury, and that no employe who is acting while in violation of the provisions of such act can recover damages where it appears that such violation caused or contributed to his injury.

Therefore, we will take up, under our first proposition, these subdivisions in their order :

(A) As a matter of common law the position which defendant in error took in riding upon the bail and cable was negligence *per se*, which precludes his recovery. This proposition is sustained by the following authorities :

The Baltimore & Ohio Railroad Co. vs. Jones, 95  
U. S. 439, 24 L. Ed 506.

Kresanowski vs. Northern Pacific Railroad Co., 18  
Fed. 229.

Warden vs. Louisville etc. R. Co., 94 Ala. 227, 10 S.  
276, 14 L. R. A. 552.

Downey vs. Chesapeake etc. R. Co., 28 W. Va. 732.

Houston etc R. Co. vs. Clemens, 55 Texas 88, 39  
Am. Rep. 799.



Burns vs. Chronister Lumber Co., 87 S. W. 163  
(Texas).

Tower Lumber Co vs. Brandvold, 73 C. C. A. 153,  
141 Fed. 919.

Haynes vs. Ft. Dodge etc. R. Co., 118 Iowa 393, 92  
N. W. 57.

Union Coal & Coke Co vs. Sundberg, 85 Pac. 319  
(Colo).

Admitting that it was the duty of the plaintiff in error to have had an indicator upon the hoisting apparatus, and that it failed to have such an indicator, nevertheless such failure was not the proximate cause of this accident for no injury would have occurred to the defendant in error by reason of the skip being pulled into the sheave timbers, had he taken a position in the body of the skip. The evidence is clear upon the proposition that no one else upon the skip was injured, and had the defendant in error sat in the bottom of the skip he would not have been injured. His negligence in riding upon the bail and cable, therefore, was the proximate cause of his injury. Further than this, the assumption of such a position by him was such negligence, which, as a matter of law, precludes his recovery.

This doctrine has been announced by the Supreme Court of the United States in the case of *The Baltimore etc. R. Co. vs Jones*, (*supra*). This was a case where a railroad day laborer was riding from his place of work on the pilot of an engine. Sometimes a car was used for the purpose of conveying the laborers to and from their work, and sometimes only a locomotive and a tender was provided. It was common, whether a car was provided or not, for some of the

men to ride on the pilot or bumper in front of the locomotive. This appears to have been done with the approval of the man who was in charge of the laborers when at work,, and the conductor of the train which carried them both ways. The train on the evening of the accident consisted of a locomotive, tender and box car. When the party was about to return on the train that evening, the plaintiff was told by his boss to jump on anywhere; that they were behind time and must hurry. The plaintiff jumped on the pilot of the engine which ran into a train of cars. The Supreme Court of the United States found that the accident was the result of the negligence of the railroad company. It appeared, however, that no one else was hurt, but two other persons, one riding on the pilot with the plaintiff, and the other one standing on the car on the track. The Supreme Court said:

“The plaintiff had been warned against riding on the the pilot and had been forbidden to do so. It was, next to the cow-catcher, obviously a place of peril especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent or direction of the company’s agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for him taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher or to put himself on the track before the advancing wheels of the locomotive. The company though bound to a high degree of care did not insure his safety.

He was not an infant nor non compos. \* \* \* \* \*

He and another who rode beside him were the only persons hurt on the train. All those in the box-car where he should have been were uninjured. He would had escaped also if he had been there. His injury was

due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The plaintiff was not entitled to recover."

In *Kresanowski vs. Ry.*, *supra*, the plaintiff was injured while riding upon the pilot of the engine, by reason of a collision with another engine. The court held that he was guilty of contributory negligence as a matter of law, and in its opinion said:

"The Supreme Court of the United States has had this question before it in several different cases, and has laid down general rules that of course will control all inferior Courts of the United States in determining when it is a proper case for the action of the Court in giving a peremptory instruction to the jury to find for the defendant by reason of the fact that the plaintiff has failed to make out his case. I think it is apparent to everyone—it cannot be questioned—that a person placing himself upon the pilot of an engine certainly puts himself in a very dangerous position; there can be no more dangerous one to be thought of upon a train or upon a locomotive. It is apparent to everyone that it is a place that is exposed to the very greatest danger. In case of any accident there is scarcely any protection at all to prevent the party from being thrown off from the locomotive; it is not a place that is gotten up or intended to be used for the purpose of persons riding upon, and in case of collision where the collision comes from the front part of the engine, it is the place of all others that is exposed to the greatest danger. Now, I think it will strike the mind of any one that if a railway company should direct or require its employes to ride upon this pilot it is requiring them to ride in an exceedingly dangerous place; but if the employe himself places himself in that position the same rule applies to him; he has himself placed himself where there

is very great danger, and the query arises whether or not that is contributory negligence.

"Now, then, the evidence in this case shows that this locomotive was used for the purpose of transporting these employes and laboring men to and from the place at which they were engaged in their work. The employes knew that; they used it day after day, without complaint, so far as the evidence shows. There was no promise upon the part of the railroad company to supply them any different mode of transportation. They went upon this engine, and the evidence discloses the fact that they got upon the engine at different places; that is to say, they placed themselves upon different positions upon this engine; and among others they placed themselves on the pilot in front of the engine. The evidence does not show that that was done by the direction of any one in the employment of the company; that is to say, neither the engineer nor fireman, nor the boss in charge of the gang, ever directed that this should be done. It seems, as far as the evidence discloses the fact, to have been done by the men themselves; they chose to place themselves in that position. It is said, however, that one reason for it—and probably the reason that is assigned—is that the engine was so full of men that some of them, if they rode at all, were compelled to place themselves in that position, in front of the engine. Granting that position, we have this case: That here is the company furnishing this engine for the men to ride upon; the men go upon it, and continue doing so day after day, when it is apparent to them that if they all ride upon that engine some of them must ride upon that pilot, and they chose to do so, and they place themselves in that position. Now, then, they know the risks. It seems to me, within the rule of this case of *Hough* against the railroad company, they concluded to use the engine for the purpose of being transported upon it, after they had knowledge of the fact that if they did so that they would be placing themselves in a dangerous position. They must have known that fact."

Warden vs. Louisville etc. R. Co., *supra*, was a case where the plaintiff who belonged to the excavating gang rode on the pilot of the engine, as there was no room for him to ride elsewhere, and while so riding was injured in a collision. The Court held that the plaintiff was, as a matter of law, charged with contributory negligence and this would be so even if the plaintiff had ridden on the pilot by the direction of the company's agents. The Court said:

"The investigation of the Court and counsel have failed to disclose a single adjudged case to the contrary while many Courts are upon the record as holding either by analogy or directly that to ride upon the pilot or crossbeam in front of an engine, without justifying necessity therefor, involves *per se* such negligence as will defeat an action, counting upon injuries received while so riding and which would not have been received but for the plaintiffs being there."

Especially aggravated becomes the contributory negligence of the defendant in error in the case at bar when it is taken into consideration that there was ample room in the body of the skip after two of the men had vacated the same at the fifth level. Here an opportunity was afforded him to get into the body of the skip. If he had done so then he would and could not have been injured.

For this reason the case of Downey vs. Chesapeake etc. R. Co., *supra*, is quite analogous. In that case it appears that the railroad company carried its workmen to and from their place of work; that on a certain occasion the train was so crowded that plaintiff could not obtain a seat in the cars. That consequently he rode upon the pilot of the engine and was thrown therefrom and injured. It appeared that before the plaintiff was injured the train had stopped and he then had a reasonable opportunity, which was known to him,



of securing a seat in the car, as some of the seats had been vacated. In holding that the plaintiff was guilty of contributory negligence the Court said:

“If the company did not furnish him a safe means for his transportation he should not have accepted or voluntarily assumed one that was extremely dangerous. And having voluntarily assumed a dangerous means of transportation or position on the train it was clearly his duty to leave it at the first opportunity offered.”

Houston etc. R. Co. vs. Clemens, *supra*, was a case where a passenger took upon himself to ride in a baggage car. The Supreme Court of Texas there held that one who is injured in an accident while unnecessarily riding in a baggage car and who would have escaped had he been in a passenger car, cannot recover, it being obvious to anyone that a baggage car is a more dangerous place in which to ride than a passenger car.

In Tower Lumber Co., vs. Brandvold, *supra*, it was held that an employe on a logging train moving backwards, who rode on the front log car instead of on a flat car provided for the men, is negligent *per se*.

Another flat car case is Haynes vs. Ft. Dodge etc. R. Co., *supra*.

The case of Union Coal & Coke Company vs. Sundberg, *supra*, is a case quite analogous to the one at bar. There the men were in the habit of riding on the cars of an outside gravity tram. Although this practice was forbidden, nevertheless the officers of the company knew of the practice. Most of the men rode inside of the cars, but the plaintiff's interstate on the occasion of the accident rode standing with one foot upon the bumper of the front car and the other foot resting upon the cable. He was thrown off

and run over. No one else upon the train was injured and had he ridden in the body of one of the cars he would not have suffered any accident. The Court in a very able opinion, following the authorities laid down in the *pilot* and other railroad cases, held that in assuming the position which plaintiff's interstate did he was guilty of negligence *per se* and was the author of his own misfortune.

(B) The defendant's violation of a positive statute, by riding upon the bail and cable which was the proximate cause, or at least contributed to his injury, precludes him from recovery in this case. This is supported by the following authorities:

- Lloyd vs. N. Carolina R. Co., 66 S. E., 604 (N. C.).
- Riley vs. Pittston Coal Mining Co., 73 Atl. 944 (Pa.)
- Morris Coal Co. vs. Donley, 76 N. E. 945 (Ohio.)
- Little vs. Southern R. Co., 66 L. R. A. 509 (Ga.)
- Consolidated Coal etc. Co., vs. Clay's Adm'r. 38 N. E. 610, 25 L. R. A. 848 (Ohio).
- Chicago etc. R. Co., vs. Snyder, 7 N. E. 604 (Ill.)
- Beaucoup Coal Co., vs. Cooper, 12 Ill. App. 373.
- Voshefskey vs. Hillside Coal Co. & I. Co., 21 App. Div. 168, 47 N. Y. Supp. 386.
- McGrath vs. City & Suburban R. Co., 20 S. E. 317 (Ga.)

The case of Lloyd vs. The North Carolina R. Co., *supra*, was a case where the plaintiff was an employe of the defendant railway and had worked twenty-four hours in violation of the Federal sixteen hour law. He alleged in his

complaint that by reason of his having worked so long he had become tired and worn out so that he did not have his faculties remaining when he endeavored to climb on a freight car of the defendant to ride home. He alleged as negligence that the defendant had caused wrongfully, negligently and unlawfully to be piled certain material along the track, of which he was not aware, and over which he stumbled in his weakened condition and fell under the cars of the defendant, sustaining very severe injuries. The Court said:

“It is very generally held, universally so far as we are aware, that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the state. In 1 Waite’s *Actions and Defenses*, p. 43, the principle is broadly stated as follows: ‘No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which its law declares to be illegal,’—citing numerous cases.”

Riley vs. Pittston Coal Mining Co., *supra*, was a case where a boy seventeen years of age attempted to oil dangerous machinery while in motion, in violation of the prohibition of the Pennsylvania Statute. The lower Court held the rule of law to be that it matters not how negligent the defendant may be, if the plaintiff himself is negligent in slightest degree which injured or resulted in or caused him the injury for which he brings the action, he cannot recover. From this holding the appeal was taken. The Appellate Court held:

“He, (plaintiff), had just finished oiling one box and as he started around the revolving wheel to oil another, slipped and caught in the moving machinery.

Being of age that made his employment lawful, his contributory negligence stands in the way of his recovery. *Lenahan vs. Pittston Coal Mining Co.*, 218

Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885.

"It is next contended that, even if it be conceded that the appellant is to be regarded as having been engaged in the work of oiling at the time he was injured, his act was not the proximate cause of his injury and did not contribute to it, the same having resulted from an intervening cause—the negligence of the defendant in not providing him a safe place to work. We are not prepared to say that such negligence was shown on the part of the defendant, and it is not necessary that we pass upon that question; for complaint cannot be made by a servant that a safe place was not provided for him when he is injured in doing that which he was expressly forbidden to do either by his master or by the written law of the land. What happened to this appellant could not have happened if he had not been doing a prohibited thing."

*Consolidated Coal & Mining Co. vs. Clay's Adm'r.*, *supra*, was a case where a coal miner had been working, drilling holes in a coal mine without first having propped and supported the roof by means of timbers and props, in violation of a statute of the State of Ohio making it a misdemeanor for any miner who intentionally and wilfully neglects or refuses to securely prop the roof of any working place under his control. It appeared in this case that a custom had arisen whereby this work was done by a man called Dalton, who was called a "filler." The Court in rendering its opinion said:

"Another proposition argued in that the trial Court

erred in refusing to give to the jury instruction Number 10, asked by the defendant, which instruction is as follows:

“The defendant asks the Court to say to the jury that if they find from the evidence that Clay was in control of the room where he got killed, that then under the criminal statute, Sec. 687, Revised Statutes of Ohio, it was his duty to properly post the room, and no custom existing at the time at the mine could relieve him of that duty.’

“Upon this point in its general charge the Court said to the jury that if they found that Clay,—‘violated a criminal statute for which violation he could have been prosecuted had he lived, such violation will not preclude a recovery in this action.’ \* \* \* \*

“The section of the Revised Statutes referred to provides among other things that—‘whoever, willingly, does any act whereby the life or health of the persons, or the security of any mine or machinery are endangered, or any miner or person employed in any mine governed by the statute, who intentionally and wulfully neglects to securely prop the roof of any work-in place under his control, shall be guilty of an offense,’ etc. The same section makes it the duty of the mine owner to keep at the working place of the miner a supply of timber suitable for posting. No doubt exists that the statute applies to this mine.”

The Court therefore held that as a matter of law the plaintiff could not recover.

*Morris Coal Co. vs. Donley*, *supra*, was a case where the plaintiff was a miner in the employ of the defendant and had started to drill in defendant's coal mine without first having propped the roof, the statute making it a misdemeanor for any miner to fail to prop and support the roof before attempting to work. The plaintiff relied upon the proposition that the space in which he was working did not permit of timbering, owing to its narrow confinement, and



that he had been directed to work there by the defendant under the assurance that the defendant had inspected the place and that the place was a safe place in which to work. The Supreme Court of Ohio in rendering its decision approved the rule laid down by it in the case of Consolidated Coal etc. Co. vs. Clay's Adm'r., *supra*, and held that the plaintiff had placed himself, in violation of the express inhibition of the statute, in a dangerous place and that such violation of the statute precluded him from recovery.

*Little vs. Southern Railway Co.*, *supra*, was a case where the plaintiff sued the defendant railway company for injuries received in a collision between two switch engines. The plaintiff was the engineer upon one of these engines. He was at that time running at the rate of from eight to ten miles per hour in violation of the city ordinance of Macon, which prohibited running of trains and cars within the city limits at a greater rate of speed than five miles per hour. He was at the time running under orders from the defendant company. The plaintiff was also guilty of a violation of a state statute requiring the engineer to check his speed at street crossings. The Court said:

“After the plaintiff had stopped his train beyond the railroad crossing and was unsuccessful in his attempts to back the cars, he started forward at a speed estimated by the witnesses as from eight to twenty miles an hour, crossing two streets in the City of Macon without checking the speed of his train. The Court charge, Civil Code, Pars. 2222-2224, requiring an engineer to check the speed of his locomotive within four hundred yards of such crossings so as to be able to stop in time should any person or thing be crossing the track; and in this connection the Court instructed the jury that if they believed that the failure of the plaintiff to observe this statutory requirement was the

proximate cause of his injury, he would not be entitled to recover. \* \* \* \* \* The statute makes it the duty of the engineer, and indeed of the railroad company, to blow the whistle and check the speed of the train. If he fails to do this as required by the statute he is subject to indictment for a misdemeanor; and if, in the commission of this criminal act, an injury results which could have been avoided but for the commission of that act, his right to recovery from the railroad company will be defeated. 1 Lablatt, Mast. and S., paragraph 362; Missouri K. & T. R. Co. vs. Roberts (Tex. Civ. App.) 46 S. W. 270. The same may be said as to the violation of the speed ordinance of the City of Macon, which prohibits the running of trains in that portion of the city at a greater rate than five miles per hour. The plaintiff admits that at the time he sustained an injury the speed of his train was from eight to ten miles an hour. When he collided with the other engine he was in actual violation of the speed ordinance of that city. He had just passed two street crossings without checking the speed of his train or attempting to do so. He rushed towards the impending collision in disobedience of the State statute requiring him to check the speed of his locomotive at street crossings, and in disobedience of the municipal ordinance limiting him to the speed of five miles an hour. If his injury was caused by reason of a violation of either the statute or the ordinance he would not be entitled to recover."

Chicago etc. R. Co., vs. Snyder, *supra*, was a case where the deceased had been an employe of one of the defendant railway companies, and was conductor upon one of the trains which came into collision at a crossing with a train of the other defendant corporation. The evidence was conflicting as to whether or not the train of the deceased had come to a stop prior to attempting to cross the tracks of the other defendant railway company. Under this conflict of the

evidence the defendant, Chicago, Milwaukee & St. Paul Railway Company, asked the following instruction which was refused:

"The Court further instructs the jury that the law requires all trains upon any railroads in this state, which crosses or intersects or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance not less than two hundred feet, nor more than eight hundred feet from the point of intersection or crossing of such road. And if the jury find from the evidence that the train of the Chicago & Northwestern Railway Company, under the charge of the deceased as conductor of said train, was not brought to a full stop at a distance of more than two hundred feet from the crossing of the tracks of the Chicago, Milwaukee & St. Paul Railway Company, and if you further believe from the evidence that the failure to stop at said distance from said crossing contributed to the injury complained, or if you believe from the evidence that had said train been brought to a full stop at said distance from said crossing, the collision would have been avoided, then you must find for the defendant Chicago, Milwaukee & St. Paul Railway Company."

The Court said:

"There is a conflict of the evidence in regard to the point where Snyder's train was stopped before making the crossing \* \* \* \* \* but, however, the fact may be the evidence was such that the defendants had the right to go to the jury on that question with proper instructions from the Court. \* \* \* \* \* The statute imposed the duty on Snyder who had charge of the train to bring his train to a stop not less than two hundred feet from the crossing. If he failed to comply with this requirement of the law, and such failure contributed to his injury, it is plain that plaintiff could not

recover for the obvious reason that the plaintiff was guilty of negligence which contributed to the injury. In refusing this instruction, the Court in fact held, that the defendants were liable although the jury might find from the evidence that if Snyder had observed the duty enjoined by the statute, the collision might have been avoided. We do not understand this to be the law."

In *Beaucoup Coal Co. vs. Cooper*, *supra*, it was held that under the statute declaring it to be the duty of the "owner, agent, or operator" of a mine, to put catches on the cage at the top of a shaft the failure of the "pit boss" to see that such catches were put on was held to be such contributory negligence as would bar a recovery for his death, caused thereby.

In the case of *Voshefskey vs. Hillside Coal & I. Co.*, *supra*, where it was held that a miner who transgressed the statute prohibiting all persons from riding on loaded cars could not recover.

*McGrath vs. City & Suburban R. Co.*, *supra*, was a case where, in approaching the point where the injury occurred the driver of a wagon was engaged in violating a city ordinance by driving at a prohibited rate of speed, and the circumstances being such as that, if this violation had not occurred the negligence of the defendant would not have produced the injury. The court held that a nonsuit was properly granted.

The Court therefore erred as alleged in our assignment of error V (a-b), in denying our motion for a nonsuit, and erred as alleged in our assignment of error VIII (a-b), in refusing to instruct the jury in this case to render a verdict for the defendant. And it appears that the evidence is insufficient to sustain the verdict and judgment thereon in the particulars specified in our specifications (a-c) upon that point.



## SECOND PROPOSITION.

The Court below admitted evidence as to the custom of more than five men riding upon the skip and especially as to the custom of the sixth man riding upon the bail and cable. (Tr. pp. 51-52-109), and instructed the jury that they might take such evidence of custom into consideration in determining whether or not the defendant in error was guilty of contributory negligence in this case (Tr. pp. 116-117).

We maintain that the fact that other employes may have been in the habit of riding upon this bail and cable constitutes no excuse whatsoever for the defendant in error having assumed such an obviously dangerous position. In this we are sustained by the following authorities:

Railroad Company vs. Jones, *supra*.

Kresanowski vs. N. P. R. Co., *supra*.

Glover vs. Scotten, *supra*.

Consolidated Coal & Mining Company vs. Floyd,  
*supra*.

Little vs. Southern Railway Company, *supra*.

Morris Coal Company vs. Donley, *supra*.

In B. & O. R. Co. vs. Jones, *supra*, it appeared that it was common whether a car was provided or not for some of the men to ride on the pilot or bumper in front of the locomotive, and that this was done with the approval of Van Ness, who was in charge of the laborers when at work, and further, when on the evening of the accident Van Ness had told the plaintiff to jump on anywhere that they were behind time and must hurry. The Supreme Court of the United States say:



"The knowledge, assent or direction of the company's agent as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might have he obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive."

In the case of *Kresanowski vs. N. P. R. Co.*, it appeared that the tender of the engine furnished by the defendant for the plaintiff to ride in was full and that he, with one or two others, sat on the front beam with his feet over the pilot. The evidence showed that this engine was furnished by the railroad company to transport them from their place of work; that employes got upon the engine at different places, among others they placed themselves upon the pilot of the engine. In basing his decision that the plaintiff was precluded by his own contributory negligence from recovering upon the doctrine as announced in the case of *Jones vs. The B. & O. R. Co.*, *supra*, Mr. Justice Shiras said:

"Now the Court there (*R. Co. vs. Jones*) held that it would make no difference in the ruling if it should be shown that the plaintiff had occupied this position upon the pilot with the knowledge, assent, or even by the direction of the company's agents. They hold that as immaterial; that those things would be no justification for his taking the risk."

In *Morris Coal Company vs. Donley*, *supra*, it was held that the fact that it was impracticable to prop the roof of the mine where plaintiff was working did not justify his violating to the positive commands of the statute that the roof must be propped.

In *Consolidated Coal & Mining Company vs. Clay's Adm'r*,

*supra*, which was another case of violation of the mining statute providing that the roofs of mines must be propped by the miners, the Supreme Court of Ohio said:

“ \* \* \* \* \* it would seem to follow that the custom set up in the petition ought not to be held to have absolved the deceased from the obligation enjoined by the statute. The object of the statute is to encourage carefulness; regarded not only for the life of the miner, but the lives of all who may be subjected to like risks. It imposes an obligation to perform a duty to others. Anything therefore which tends to operate in opposition to that obligation would violate the policy of this state and hence whatever right the custom at this mine, of imposing upon Dalton the work of propping and posting the roof of the room, may have given Clay to call upon Dalton to do the manual work of posting, and delay his own work until that had been properly done, such custom ought not to have the effect to exonerate Clay from the duty enjoined by the statute nor shift the risk undertaken by himself over upon the company.”

In the case of *Little vs. Southern Railway Co.*, *supra*, which was the case of violation of the speed ordinance, the Supreme Court of Georgia says:

“But he (plaintiff) says that he was commanded by the railway to disobey both the statute and the speed ordinance, and that, even if there was no express command to that effect, there have been such repeated violations as to amount to a custom. It would be contrary to public policy for Courts to relieve a citizen of the consequences of his act in violating the law or his duty to society and it cannot be any defense that someone else either assisted in the offense or commanded him to do it. *Missouri K. & T. R. Co. vs. Roberts*, (Tex. Civ. App.) 46 S. W. 27. It is no justification for one crim-

inally responsible for his conduct that another commanded him to do an act which is inhibited by law. No custom, however universal, could have the effect of repealing a penal statute and the mere forbearance of the corporation to prosecute for repeated violation of the ordinance would not amount to an implied repeal of the ordinance \* \* \* \* \* It follows that, if the railway company either commanded or connived at a violation of the penal law, the plaintiff who was the actual perpetrator could not recover of the defendant for an injury traceable to the violation of the statute."

We therefore contend that the Court erred in admitting evidence of custom as alleged in our assignments of error Numbers 1, 2, 6 and 7, and the Court further erred in instructing the jury as alleged in our specification of error Number 9 to the effect that they should take such evidence of custom as had been introduced into consideration in determining whether or not the defendant in error was contributorily negligent in assuming a place upon the bail and cable.

### THIRD PROPOSITION.

We next contend that the Court erred in admitting evidence to the effect that there was no other signalling system than the flashlight system and that no bells had been installed. (Tr. p. 57). We cannot conceive how the failure to install a bell system of signalling could have in any way been responsible for this accident, or that if such system had been installed this accident would not have occurred. It appeared that the flashlight system was adequate for all purposes; that it had been successfully used just prior to the accident and immediately subsequent thereto. The admission of such

evidence was certainly prejudicial to the plaintiff in error for plaintiff in error's failure to install such a Bell system was wrongfully paraded before the jury. Every lawyer knows just how prejudicial the introduction of such testimony is to the case of a corporation who defends a case for personal injury, and the greatest care should be exercised to exclude such evidence which has a tendency to wrongfully prejudice a jury against a defendant.

#### FOURTH PROPOSITION.

The same argument may be applied to the admission of evidence respecting the condition of the cable. (Tr. pp. 77-78). It cannot be conceived how the condition of this cable in any way contributed to this accident, or how a different or other cable than the one used would have avoided the accident. It makes no difference whether this cable was old or new. It certainly appears from the evidence that though the skip was pulled by the hoist into the sheave timbers, nevertheless, the cable was so strong that it did not break and therefore sufficient for the only use to which it was put or intended. We therefore insist that the evidence of a defective cable was wrongful and prejudicial to the plaintiff in error, admitted before this jury, and that such admission is at least partially responsible for the verdict in this case.

#### FIFTH PROPOSITION.

The accident was caused by the negligence of a fellow servant. The evidence shows that the hoist operator ran the skip up this incline at an excessive rate of speed so that wit-

ness Chism, who attempted to pull the cord and give the signal, was unable to do so and to give an effective signal in the limited time in which he had. (Tr. pp. 44-45). That the hoist man and the men riding in the skip, including the plaintiff, were fellow servants, cannot be questioned, and for the negligence of the hoist man in drawing this skip up this incline at such an excessive rate of speed that it was impossible to give a proper stopping signal at the top station, and thereby causing this accident, the master is not responsible.

It is therefore clear to our minds that this accident was caused by the negligence of a fellow servant concurring with the grossest sort of contriutory negligence on the part of the defendant in error, in this case.

Therefore the Court should have granted the motion of plaintiff in error for a nonsuit as assigned in specification of error V (b) and it appears that our specifications of the insufficiency of the evidence to sustain the verdict and judgment thereon are likewise well taken.

Respectfully submitted,

FEATHERSTONE & FOX,

Wallace, Idaho.

Attorneys for Plaintiff in Error.



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# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT

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THE FEDERAL MINING &  
SMELTING COMPANY, a  
corporation,

*Plaintiff in Error,*

*vs.*

C. H. HODGE,

*Defendant in Error.*

No. 2325.

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*Brief of Defendant in Error on Writ of Error  
to the United States District Court of  
the District of Idaho, Northern  
Division.*

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For brevity we will refer to the Defendant in Error as the Plaintiff and to the Plaintiff in Error as the Defendant.

Figures in ( ) refer to pages of the Transcript of the Record.

## STATEMENT OF THE CASE.

The plaintiff in his complaint assigned negligence of defendant in failing to have any indicator on the hoist so that the hoistman would know the location of the skip, in not having any proper system of signals for stopping the skip; that the skipway was improperly lighted, the cable was old and uneven in size and did not wind evenly around the drum, or to provide proper rules for the operation of the skip.

The plaintiff with five other employees got into the skip and when the employee in charge of the skip saw it was going past the station at the top, signalled to the hoistman to stop, or attempted to signal to him. The signal system is described in the testimony of Chism (pages 44 and 45). The hoist did not have any indicator on it (57). The offices of the indicator are to disclose the position of the

skip (62 and 63), and with the flash system of signals the hoistman has no means of knowing the location of the skip if the flash does not work (66). That the flash lights do not always respond is established by the evidence of Ashby (70 and 71).

A hoist is not properly equipped unless it is provided with both an indicator and a signal.

The cable was old, did not wind evenly on the drums and was covered with mud (78). This according to the testimony of Mr. White (100-101-102-103 and 104). On page 104 the witness, who was the Chief Engineer for the Company, testified that a signal system which would not respond was not a safe system.

## DEFENDANT'S ASSIGNMENTS.

### I.

No. 1 is based on the overruling of an objection (page 7, brief) to inquiry as to any custom. This question appears on page 52 of the Transcript, but there does not appear to be any objection to it. This testimony was for the purpose of showing that the company always, or as long as the skip had been in operation, had operated it in the same way it

was on the date in question and that the bail had been habitually used for one of the men to ride on. It was not the fact of his riding on the bail which caused the accident but the negligent running of the skip into the timbers. At any rate, this evidence was not prejudicial, for on page 48 counsel, on cross-examination, interrogated the same witness and brought out the evidence that six men always rode in the skip, one of them on the bail.

## II.

The question "Always?" appears to have been objected to and the objection overruled, but the question was not answered. If not answered certainly the overruling of counsel's question would not be prejudicial.

## III.

This relates to a question found on page 57: "Q. Any bell system for signalling?" The objection was "It is shown that we have a sufficient system of signalling."

We don't understand this to be an objection, simply an indirect manner of counsel establishing for his client the sufficiency of their system.

## IV.

This assignment is based upon this question: "What was the condition of the cable on this hoist?" There was no objection to this question and the following question asked for explanation of the answer when counsel for defendant again took the stand and testified as follows: "I object, if your honor please, it couldn't possibly be the cause of the injury." If any one was prejudiced it was the plaintiff, but on page 78 the witness testified that because of the bad condition of the cable it did not wind evenly on the drum.

## V.

This assignment relates to the refusal of the court to grant a non-suit.

A reference to pages 112 and 113 will show that counsel did not renew this motion at the close of all the testimony in the case and has therefore waived it.

## VI.

This assignment relates to this question: "Q. And one of them was on the bail?" This question was not objected to. An objection was submitted to the following question,



but it was not answered. Therefore, there could be no prejudice to defendant.

## VII.

The question complained of in the assignment was not answered.

## VIII.

This assignment relates to the refusal of the court to instruct the jury to return a verdict for the defendant:

(A) That there was no actionable negligence which was the proximate cause.

(B) Because plaintiff was guilty of contributory negligence and assumed the risk.

We don't know just how this question arose, whether upon requested oral or written instructions. At any rate they both relate to matters of fact and not questions of law.

## IX.

This relates to a charge which was not given by the court.

## ARGUMENT.

We feel that any reference to Assignments of Error I, II, III, IV, V, VI, and VII, would not serve any useful purpose, because

they all relate to the admission of evidence where no objection or exception was received, with the exception of V, which relates to the refusal of the court to grant a non-suit. This assignment is waived by failure of the defendant to renew the motion at the close of all the evidence.

Assignments VIII and IX have been heretofore referred to and even if defendant had preserved its record so that an error based upon said assignments could have been reviewed, the instruction refused, on page 11 of the brief, which did not appear in the record, as well as the instruction given on page 12, was not error.

Beginning on page 16 counsel refers to page 269 of the Session Laws of Idaho, Section 20, relating to employees riding upon the bail of a hoisting bucket, cage, or skip. Upon this subject we feel it would not be fair to the trial court for this court to review any matters which were not presented in the court below. The question of the effect of this statute was never presented to the able trial judge, who presided, and therefore he did not commit any error relating thereto. As has

been frequently said, this court is one for the correction of errors committed by the trial court. This was decided squarely in the case of *Lake County, Colorado, vs. Sutliff*, 97 Fed. 270. On page 275 the following language was used:

“Were the issues or points in controversy in this action actually raised and litigated in the former suit? This question was never presented to the trial court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, no error was ever assigned, to any ruling upon it. It is, therefore, not here for our consideration. In an action at law, this is a court for the correction of the errors of the court below, conclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. (Citing *Ry. Co. vs. Henson*, 19 U. S. App. 169, 7 C. C. A. 349; *Phillip Schneider Brewing Co. vs. American Ice Mach. Co.*, 40 U. S. App. 382, 23 C. C. A. 89, 77 Fed. 139; *Manufacturing Co. vs. Joyce*, 4 C. C. A. 368, 54 Fed. 332.”

And again in the case of the *Charleston Ice Manuf'g Co. v. Joyce*, 54 Fed. 332-333, the following language was used:

“The necessity for this rule is so apparent, and the rule itself is so universally enforced

by the courts, that further consideration of the question is not required of us. The following cases show the practice to be as we have stated, and demonstrate its wisdom and the importance of adherence to it. *Camden v. Doremus*, 3 How. 530; *Harvey v. Tyler*, 2 Wall. 328, 339; *Beckwith v. Bean*, 98 U. S. 266, 284; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. Rep. 313; *Moulton v. Insurance Co.*, 111 U. S. 335, 337, 4 Sup. Ct. Rep. 466; *Burley v. Bank*, 111 U. S. 216, 4 Sup. Ct. Rep. 341; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. Rep. 832; *Railroad Co. v. Charles*, 51 Fed. Rep. 562, 571. We think it clear that the court below properly overruled the general objection made during the trial, as recorded in the bill of exceptions, and it is equally as clear that this court cannot, on writ of error, consider the specific objections made before it, and not presented to the court below."

We do not understand that this court will take judicial knowledge of what the statute of Idaho is, but, inasmuch as counsel has cited it we also desire to call the court's attention to Sections 12 and 15 of said Statute, which are as follows:

#### Section 12:

"Whenever a steam, electric, gas, air or water-driven hoist is used in handling of men, in mines, it shall be equipped with an indicator placed in clear view of the hoist engineer, and geared positively to the shaft or drum of the hoist and so adjusted with dial

or slide as to provide a target or indicator that will at all times show the exact location of the bucket, cage or skip."

### Section 15:

"Every mining property using hoisting apparatus within the State of Idaho shall keep one copy of this entire code posted on the gallows frame, and a copy of the bell signals before the hoisting engineer, and on each station."

Section 29 relates to fine for failure of corporation to comply with this statute.

### NO ASSIGNMENTS BASED ON THIS STATUTE.

The Assignments of Error begin on page 125 of Transcript of Record and end on page 133. In none of these is any reference made to the statute. In the specifications, page 131, there is no reference to the statute.

Before a ruling, or error, can be relied on in this court it must have been urged in the trial court and incorporated in the Assignments of Error.

In the case of *City of Findlay vs. Pertz*, 74 Fed. 681, a statute of the State of Ohio was involved. In the appellate court it was urged that the statute invalidated a certain



municipal contract. In disposing of the question the court said:

“It is enough to say that a careful examination of this record shows that this question is now for the first time raised. \* \* \* The question is not presented by any assignment of error \* \* \*. To have obtained the benefit of a consideration of this question it should have been presented to the trial court. \* \* \*. To have obtained the benefit of any error in respect to the action of the Circuit Court below in failing to give effect to this Ohio statute, there should have been some specific assignment, definitely pointing out the action of the court against which the complaint is made.”

Having studiously avoided any reference to the statute on motion for non-suit (87-88), having failed to move for a directed verdict on that ground at the close of all the evidence (112) and having failed to request any instruction or make any assignment of error it cannot now be raised. While we are confident of our position on this question, we submit, however, that there is no evidence of the defendant company having complied with the statute relative to posting the notice of its regulation. It is not such a statute that knowledge of it is presumed, being in the nature of a regulation. Evidently the Legis-

lature regarded it as a regulation for they directed its posting for information of the employees. Again we do not understand that the position of the plaintiff in the skip was the cause of the injury. This was not a question of law, but one of fact and the statute would not aid the defendant. Anyway we would question the authority of the Legislature to make the manner in which an employee does his work a criminal act.

WHETHER DEFENDANT WAS NEGLIGENT: WHETHER PLAINTIFF WAS NEGLIGENT AND PROXIMATE CAUSE OF THE INJURY.

We have shown that there was no indicator on the hoist and that the cable was old and did not wind evenly on the drum. Because of the absence of the indicator the hoistman could not know the position of the skip in the skipway and ran it into the timbers at the top. We have also shown that the defendant required six employees to ride in the skip at a time, one the same way the plaintiff was riding (47-52). That being the unvarying custom in the mine, with the full knowledge of the persons in charge, the defendant

company cannot claim that any instructions were violated which would prevent the plaintiff's recovery. The mere fact that the plaintiff was the only one injured is no proof of his negligence. They had been riding in this same position ever since the skip had been in use.

This court has passed upon the identical question in the case of *Olson vs. Cook Inlet Coal Fields*, 121 Fed. 626. The plaintiff in that case was sitting between the engine and the first car of a string of coal cars, and this court in reversing the District Court of Alaska held that the question of contributory negligence was plainly one for the jury. The position of the plaintiff had nothing to do with the cause of the accident. The cause of the accident was the failure of the defendant company to properly equip the hoist.

In the case of *Alaska United Gold Mining Co. vs. Keating*, 116 Fed. 561, this court said:

“With respect to the defense urged that the plaintiff was guilty of contributory negligence; it is necessary to understand what constitutes contributory negligence in a case of this character. It is the want of ordinary care and prudence on the part of the person injured by the actionable negligence of another,

combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. 7 Am. & Eng. Enc. Law (2d Ed.), p. 371. Assuming that the presence of an obstruction in the shaft ought to have been ascertained by the defendant before the skip on which plaintiff was riding was sent down, and that this omission was the negligence of the defendant, then it is clear that the plaintiff's position on the skip, although it may have been dangerous, was not a proximate cause of the injury, as it did not combine or concur with the defendant's negligence in causing the injury."

### CONCURRING NEGLIGENCE.

It is strenuously insisted by counsel that the negligence causing the injury was that of the hoistman. The hoistman testified that he did not get the signal (77). He also testified that the cable did not wind evenly on the drum. The man in charge of the skip testified (44 and 45) that he endeavored to give the signal, which shows the signal apparatus was not sufficient. The testimony is all to the effect that if there had been an indicator on the hoist the hoistman could have known at all times the position of the skip.

Mr. White, the foreman of the mine, on cross-examination (103-104), testified that a

signal system of this kind would not be proper if the signal was given and the light did not flash below and further testified that an indicator was an assistance for the hoistman in locating the position of the skip.

Any construction which can be placed upon the evidence must place the blame upon the defendant company for failure to employ proper machinery to be used in the mine. We fail to see where any negligence is attributable to either the hoistman or the man in charge of the skip. Even if it were conceded that one or the other was negligent in some particular, yet, that is not a defense, because it was established that the defendant company was negligent, and where the negligence of a fellow servant concurs with that of the master the defense of fellow servant cannot be invoked.

*Grand Trunk R. Co. vs. Cummings*, 106  
U. S. 700.

We respectfully submit that the defendant company has not reserved exceptions entitling it to urge any of the objections raised in the brief, especially upon instructions given or requested, evidence admitted, or the Statute



of Idaho cited in the brief. Upon the other question of contributory negligence and proximate cause, the question was clearly one for the jury. The fellow servant, which was not established by the evidence, is not, in our opinion in the case, and if it is, only in the way of concurring negligence.

The judgment should therefore be affirmed.

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FRED MILLER,

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*Attorneys for Defendant  
in Error.*

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UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FEDERAL MINING & SMELTING  
COMPANY, a Corporation,

Plaintiff in Error.

vs.

C. H. HODGE,

Defendant in Error.

NO. 2325

REPLY BRIEF OF PLAINTIFF IN ERROR.

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UNITED STATES  
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THE FEDERAL MINING & SMELTING  
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vs.

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Defendant in Error.

NO. 2325

REPLY BRIEF OF PLAINTIFF IN ERROR.

With the permission of the Court we desire to briefly reply to some of the propositions advanced in the brief of the defendant in error in this case:

FIRST

It is insisted by counsel for defendant in error that we failed to make a motion for a directed verdict at the close of all the testimony in the case. This is not the fact as we

understand it. On Page 119 and 120 of the transcript it will be found that we excepted to the refusal of the Court to grant our requested instruction in the words following: "You are instructed to find a verdict for the defendant in this case." And in our exception assigned as error: First: That there was no actionable negligence shown on the part of the plaintiff in error, and second: That the negligence of the defendant in error contributed to his injury. On Page 120 and 121 of the transcript is found the certificate of the trial Judge to the effect that the foregoing bill of exceptions, including the said exception, is true and correct and to the effect that the Court actually refused the said instruction and that the said exception to the said refusal was true and correct and in the form the said exceptions were made. Our request for said instruction is equivalent to a motion to direct a verdict. To this effect is the case of,—

Detroit Crude Oil Co. vs. Gravelle, 94 Fed. 73 (C. C. A. Sixth Circuit).

This was a case where at the close of all the testimony the defendant requested the Court to charge the jury that their verdict must be for the defendant. The Court said, Page 76:

"The Court also refused the defendant's first request which was in this language: 'Under the evidence in this case, the verdict of the jury must be for the defendant. This request must be regarded as in all respects equivalent to a motion to direct a verdict, for it could have no other purpose or meaning and we accordingly so treat it. The first question with which we deal is raised by the Court's refusal to grant defendant's request to direct a verdict, for this is assigned as error.'"

And the Court proceeds then to a discussion of the entire case and reverses the case upon the ground that the Court should have granted said instruction.



We therefore say that the question as to whether or not the defendant's contributory negligence in this case bars his recovery as a matter of law is properly raised upon this record and is properly before this Court.

But further than this, in our specifications of the insufficiency of the evidence to sustain the verdict and the judgment hereon we specify that the undisputed evidence conclusively shows that the plaintiff rode upon the bail and cable and at the same time fails to disclose any legal excuse for so doing, and thus also properly raise the question as to whether or not the negligence of the defendant in error was negligence as a matter of law.

## SECOND

It is next contended by counsel for the defendant in error that we did not raise the question in the Court below that the defendant was guilty of contributory negligence in riding upon the bail and cable in violation of a positive statute of the state. We do not admit this at all. As has been shown we repeatedly and strenuously urged in the Court below that the defendant in error in sitting and riding upon the bail and cable of this skip was guilty of such contributory negligence as would bar his right to recover as a matter of law. Contrary to the position which counsel has taken on Page 9 of his brief that the federal courts will not take judicial knowledge of the statute of Idaho, the Supreme Court of the United States has repeatedly held that they and all federal courts will take judicial notice of all state statutes and that it is not necessary to either plead or prove such statutes.

The case of *Owings vs. Hull*, 9 Peters 607, 9 L. Ed. 246, is

very much in point. This was a case where an objection was made in the lower court to the introduction of the copy of an instrument for the reason that no proof had been made why the original was not produced. The validity of this objection depended upon a statute of the State of Louisiana. The Supreme Court of the United States on Page 625 of the United States Reports, and Page 252 of the L. Ed., say:

“We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress not for the purpose of administering local law of a single state alone but to administer laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states. And this Court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. The jurisprudence is, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.”

Can it be contended for a moment that if this were a statute of the United States that the Court below did not err in disregarding the statute because, perchance, the statute was not called to the specific attention of the Court or that this Court cannot give effect to that statute because the record does not disclose that this statute was specifically called to the attention of the Court below. The lower Court is conclusively presumed

to have had knowledge of this statute and it is to be conclusively presumed in this Court that the action of the Court in refusing to take this case away from the jury was had with a knowledge on the part of the Court that this law existed.

So in the case of,

Mills vs. Green, 159 U. S. 651, 40 L. Ed. 293,

The Supreme Court say:

“The election of delegates and the assembling of the convention are public matters, to be taken notice of by the Court without formal plea or proof. The lower courts of the United States, and this Court, on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union. (Citing numerous cases). Taking judicial notice of the constitution and laws of the state, this Court must take judicial notice of the days of general public elections of members of the legislature or of a convention to revise the fundamental law of the state as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect. (Citing numerous cases).”

In Lamar vs. M̄cou,

114 U. S. Page 218, 29 L. Ed. 94,

The Supreme Court says:

“The law of any state of the Union, whether depending upon the statutes or upon judicial opinions, is a matter of which the Courts of the United States are bound to take judicial notice without plea or proof. (Citing cases).”

And again in the case of,—

Pennington vs. Gibson, 16 Howard 66, 14 L. Ed. 847,  
at Page 81 of the U. S. Reps. and at Page 853 of  
the L. Ed.

Say:

“And in further confirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several states of this Union, and with respect to these nothing is required to be specifically averred in pleading which would not be so required by the tribunals of those states respectively.”

The cases which counsel has cited that an appellate court will not review questions which were not presented to the Court below, and which are presented for the first time on appeal, are not in point. This principle we not only concede, but approve. It is our contention, however, that we did present the question below, and this question is: *Was the defendant's conduct in sitting upon the bail and cable contributory negligence as a matter of law?* And the question below was not as to the existence of the statute. The statute is cited now merely as showing that the point made below was well taken because there was a violation of it.

The case of the City of Findlay vs. Pertz, 74 Fed. 681, is not in point. The statute in that case made the contract void, but the validity of the contract either under this statute or otherwise, was never raised in the Court below. Various defenses were set up to the contract, but never was it said below that the contract was invalid and there was no assignment of error whatsoever directing the attention of the court

below or the appellate court, to the invalidity of the contract. The Court therefore said:

“To have obtained the benefit of a consideration of this question (*namely as to whether or not the contract was void under the statute*) it should have been presented to the trial court *in some form.*”

In the case at bar, however, the question as to whether or not the position of the defendant in error in riding upon the bail and cable constitutes contributory negligence per se was squarely presented to the court who had judicial knowledge of the existence of the statute prohibiting the plaintiff from riding thereon, and we cannot conceive how it may now be argued that the Court below could have brushed aside his judicial knowledge of this statute in deciding this question; and that he did not commit error in failing to give the statute its full force and effect because, perchance, the Court below may have forgotten the text of the statute or that the same was not specifically called to his attention. As well might it be argued that we could not present judicial opinions to your honors upon this or any other point of law, because forsooth we did not call them to the trial court's attention.

### THIRD

It is next urged by counsel, although inferentially only, that we should not be permitted to set up the violation by the defendant in error of the positive inhibition of this statute, which prohibits him from riding upon the bail and cable of the hoist, by reason of the fact that the plaintiff in error itself had



failed to comply with Section 12 of the same act, which requires each hoist to be equipped with an indicator. In other words it is inferentially contended that contributory negligence is no defense where the basis of the master's alleged negligence is the violation by him of a statute. This is not the law, and the Supreme Court of the United States in the case of,—

Schlemmer vs. Buffalo, etc., R. Y. Co., 220 U. S. 590,  
55 L. Ed. 596.

holds the opposite doctrine.

In that case it appeared that a shovel car was not equipped with an automatic coupler as required by the Act of March 2, 1893, Chapter 196, Paragraph 2, 27 Stat. At. L. 531, U. S. Com. Stat. 1901, Page 3174, and that fact was the basis of the action for damages. It appeared further that the statute expressly excluded the defense of assumption of risk. But in regard to the defense of contributory negligence the Court say:

“But there is nothing in the statute absolving the employe from the duty of using ordinary care to protect himself from the injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employe was not for that reason, absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employes. (Citing numerous cases).”

And the Court in that case held that the plaintiff was barred from recovery by his contributory negligence as a matter of law. To the same effect is,

Denver, Etc., R. Co. vs. Arrighi, 121 Fed. 347, 63 C. C. A. 649, Eighth Circuit,

Cleveland etc. R. Co. vs. Baker, 61 Fed. 224, 33 C. C. A. 468.

Gilbert vs. Chicago etc. R. Co., 123 Fed. 832, Affirmed 128 Fed. 529, 63 C. C. A. 27.

It seems unnecessary to cite any further cases upon this point as it is sustained, as far as we are aware, by all authorities and we will content ourselves with saying that the following states have enunciated the same principles: Delaware, Indiana, Massachusetts, Minnesota, Texas, Rhode Island, Vermont, Washington, New Jersey, Michigan, Pennsylvania, New York, Wisconsin, Kansas, Missouri, Montana, North Carolina, Louisiana and Iowa.

#### FOURTH

There is one more proposition set up in respondent's brief and that is as to the rulings of this Court respecting contributory negligence as announced in the case of,—

Alaska United Mine Gold Co. vs. Keating, 116 Fed. 561.

And the case of

Olson vs. Cook Inlet Coal Fields, 121 Fed. 726.

In the Olson case the plaintiff was sitting on the rear end of a small engine between it and the car. This was not obviously a dangerous place in which to sit nor a place where a reasonably prudent man might have anticipated danger, nor

could it have been foreseen by him or anyone else that an accident of this character should have happened to him. The Olson case, in our judgment, is not at all in point, and in that case it could be at all contended that the plaintiff voluntarily assumed a dangerous position, it certainly was a question for the jury.

As far as the Keating case is concerned this Court held that the accident to Keating was directly due to the failure of the master to lower the bucket empty for the purpose of determining whether or not the shaft was clear from obstruction. This was the direct and proximate cause of the accident. Nothing in that case indicates that the accident would not have happened had the plaintiff not stood where he did. It was the jar of the bucket coming in contact with the obstruction in the shaft which threw him from this position just as it might have thrown him had he stood or sat anywhere else in or upon the bucket. His position was not therefore necessarily the proximate cause of the accident and did not necessarily contribute to the accident.

It is not contended by us that the mere sitting upon a bail or cable precludes a plaintiff from recovering where an accident happens in a skip and where it is not shown that the position which he has taken contributes to his injury. We can also conceive of cases where a question arises as to whether or not such a position contributed to the accident, in which event it is proper to submit such matter to the jury for determination; but where the evidence shows, as in the case at bar, that the accident could not and would not have happened had the plaintiff not voluntarily assumed an obviously dangerous place and one which is prohibited by a statute, then we say that he comes squarely under the decision

of the Supreme Court in the case of Jones against the Railway Company, and his position is contributory negligence as a matter of law.

And further than this, in the case at bar, as we have already seen the failure to have an indicator upon the skip was not the proximate, or any cause for the accident, but the real cause of this accident was, First: That the appliances, such as they were, were being operated in an unskillful and dangerous manner, to-wit, by running the hoist at too great a rate of speed, so that the men upon the hoist could not give an adequate signal and Second: The defedant in error's position in placing himself upon the bail and cable in such a way that the accident was caused thereby. It can be demonstrated to a certainty that the accident would not have happened, despite the fact that there was no indicator upon the skip had these appliances been used in a proper manner, and had the plaintiff taken a seat in the body of the skip where he belonged, instead of riding upon the bail and cable thereof in violation of statute, and in violation of the duty which he owed to himself and to his master to use reasonable care and prudence not to place himself unnecessarily in harm's way.

We strenuously urge that there is no analogy whatsoever between the Keating case and the case at bar. In the Keating case the position taken by the plaintiff was ordinarily safe and was rendered dangerous only by the fact that the master had failed to discover an obstruction in the shaft. Keating's particular position upon the bucket was simply an incident in the event of the accident and was in no sense a cause of the accident and not a contributory factor thereto; at least there was such grave question in that case as to whether or not Keating would have been injured had he stood elsewhere

upon the bucket that it was properly a case to go to the jury. But, as has been seen, in the case at bar it has been demonstrated to almost a mathematical certainty that the defendant in error unnecessarily and without excuse placed himself in a position which courted accident which would positively not have happened to him had he placed himself within the skip. The position assumed by the defendant in error of lying in a cramped position upon the bail and cable of this skip, which was being hoisted at the rate of more than 250 feet per minute, was so obviously dangerous that we cannot conceive how our position in this matter can be questioned. Such position certainly is a hundred times more dangerous than sitting on the pilot of an engine as was done in the Jones case, or sitting on the end of a flat car, which has been held to be negligence per se in the cases cited in our main brief. If your honors can conceive of a man riding up that incline, lying upon the bail and cable of the skip with nothing between him and the incline but a bail and cable, I think you will agree with us that nothing but recklessness and the contempt for danger, which familiarity therewith so often breeds, could have induced the defendant in error to take such a position.

Respectfully submitted,

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